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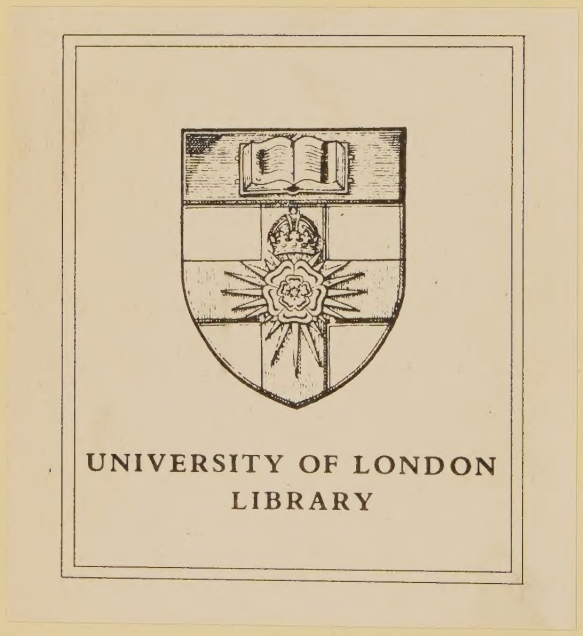

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CORRIGENDA.

Page 94, line 13, *for* "extrinsically," *read* "intrinsically."
,, 192, ,, 5 of headnote, *for* "Q. B." *read* "I. R."
,, 709, ,, 10, *for* "extent," *read* "intent."

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1903.

HOSFORD, APPELLANT; M'AULIFFE, RESPONDENT (1). *K. B. Div.* 1902. June 30.

Fishery Acts (26 & 27 *Vict. c.* 114, *s.* 6; 32 & 33 *Vict. c.* 92, *s.* 16)—*Fixed engine—Certificate of inspectors—Engine not corresponding in description with the certificate.*

The certificate of the Fishery Commissioners, given pursuant to 26 & 27 Vict. c. 114, s. 6, affords no defence to a prosecution for erecting or using a fixed engine for fishing, contrary to 32 & 33 Vict. c. 92, s. 16, unless the fixed engine so erected or used is, in "situation, size, and description," in conformity with the certificate.

CASE STATED by the Justices of county Clare, sitting at Knock petty sessions on the 10th June, 1902, for the opinion of the Court. The case stated was to the following effect:—The defendant was charged under 32 & 33 Vict. c. 92, s. 16, upon a complaint that, "he on the 9th day of April, 1902, at Mount Shannon

(1) Before PALLES, C.B., and WRIGHT, J.

K. B. Div. 1902.

HOSFORD, *Appellant;* M'AULIFFE, *Respondent.*

in the river Shannon, in said district and county, made use of and had erected a fixed engine for the capture of salmon without having obtained a certificate from the Special Commissioners of Irish Fisheries under the provisions of the Salmon Fishery (Ireland) Act, 1863, or a certificate from the Inspectors acting in the execution of the aforesaid Act in regard to such fixed engine." At the hearing it was proved before the Justices, on the part of the appellant, by Frederick Hall, Inspector of Fisheries for the Board of Conservators of Fisheries of No. 8, or Limerick, district, that on the 9th day of April, 1902, he (the witness) inspected the said fixed engine so used and erected by the defendant, situate at Mount Shannon, in the river Shannon aforesaid; that he took the measurement of same, and that the first leader was 297 feet long, the second leader 43 feet long, and the head 32 feet long; and that, in addition to this, the said fixed engine had a wing off the head 39 feet long, a back rail 99 feet long, and a wing off the back rail 66 feet long. These measurements and facts were not questioned or denied by the respondent; but on cross-examination by the respondent's solicitor the witness admitted that within a month after the 9th day of April as aforesaid he saw the said fixed engine again, when the wings off the head and the back rail had been removed. The appellant admitted that the Special Commissioners of Irish Fisheries granted a certificate for the erection of a fixed engine at Mount Shannon, in the river Shannon aforesaid, and described in said certificate the size to be as follows:—"The leader 274 feet long, and the head 50 feet long and 19 feet wide." The Justices adopted the respondent's contention, viz.—that the mere fact of the fixed engine being of greater dimensions and of a different description from that set forth in the certificate, did not give them jurisdiction to convict the respondent of using and erecting a fixed engine for the capture of salmon without having obtained a certificate from the Special Commissioners under the Fishery Act of 1863, or a certificate from the Inspectors acting in execution of the Act. They, accordingly, not being satisfied that they had jurisdiction to make an order convicting the respondent under section 16 of the 32 & 33 Vict. c. 92, dismissed the case without prejudice. At the appellant's request they now stated this case for the opinion of the Court as to whether they, the

Justices, were correct in point of law in their determination, or as to what should be done in the premises.

E. Phelps, and *H. D. Conner*, *K.C.*, for the appellant.

P. Lynch, and *T. M. Healy*, *K.C.*, for the respondent.

[During the argument the following authorities were referred to: — *M'Inerney* v. *M'Auliffe* (1); *Doran* v. *Cunningham* (2); *Wilson* v. *Moy Fishery* (3).]

PALLES, C.B.:—

This case is covered by authority. The magistrates state that the length and description of the engine with which the respondent was fishing were admitted, the measurements being, "the first leader 297 feet long, the second leader 43 feet long, and the head 52 feet long, and that in addition to this the said fixed engine had a wing off the head 39 feet long, a back rail 99 feet long, and a wing off the back rail 66 feet long." These measurements and facts (they state) were not questioned or denied by the respondent.

What is the justification relied on for using the fixed engine so described? A certificate of the Fishery Commissioners, which describes the engine as follows:—"The leader 274 feet long, and the head 50 feet long and 19 feet wide, such measurements being understood to be such as not to extend such fixed engine beyond the low water mark of ordinary spring tides."

The contention of the respondent was and is that a certificate for a net *of any size* at the *locus in quo* ousts the jurisdiction of the Justices; that in such a case they are without jurisdiction to consider the length of the net, or whether it in other respects answers the description in the certificate. The Justices yielded to this contention, and the question they ask us is whether, in so doing, they were right in point of law.

(1) Fishery Cases, June 12, 1891. (2) 20 L. R. Ir. 544. (3) 19 L. R. Ir. 270.

K. B. Div. 1902.

HOSFORD, *Appellant;* M'AULIFFE, *Respondent.*

Palles, C.B.

Well, beyond all doubt they were wrong in point of law. The point is distinctly decided in *M'Inerney* v. *M'Auliffe* (1). The judgment of Holmes, J., in that case not only is binding on us, but is unanswerable in its reasoning. The Legislature declares generally that all nets of a description within which the present falls are illegal, and then makes exception in favour of certain particular nets, in respect of which a certificate has been obtained. That certificate must state the situation, size, and description of the net (2). The Act gives a parliamentary title to a certain particular thing; and what the defendant is entitled to do is, to use that particular thing. We agree in the reasoning of Lord Justice Holmes, and from it it necessarily follows that the offence here charged has been committed.

There was one matter mentioned by Mr. Healy, which at the time suggested to my mind a point worthy of consideration, that is that the thing forfeited under 32 & 33 Vict. c. 92, s. 16, is "such fixed engine," and that power is given to the bailiffs to "seize and take possession of any such fixed engine." I desire to guard myself from expressing any opinion whether "such fixed engine" in this section includes the entire of the fixed engine, part of which was found to be in excess of the right given by the certificate, or whether the words do not mean the excess only, where the construction of the net is such that the excess is severable. We leave that matter undetermined.

It appears to us, then, that section 16 is so clear as to render the present case unarguable. We do not understand Mr. Justice O'Brien, in *Doran* v. *Cunningham* (3), to have decided that the *size* was immaterial. There he had another fact before him, viz. the *situation*, which rendered it immaterial to consider the *size*.

In reference to the form of the summons, it need not have the particularity of an indictment. No doubt a conviction may be rendered bad by describing the alleged offence by reference to an insufficient summons; but *quâ* summons, the primary purpose of which is to bring a defendant before the magistrates, it may

(1) Collection of Fishery Cases, 12th June, 1891.
(2) 26 & 27 Vict. c. 114, s. 6. (3) 20 L. R. Ir. 544.

be sufficient, and the magistrates have power to amend the summons by altering the statement of the offence charged. Of course it will be the duty of the appellant, when the case goes back to the Justices, to see that their determination is in proper form.

The case must be remitted back to the Justices, with the opinion of this Court that they were wrong in point of law, and that, upon the facts admitted by the defendant, they ought to have convicted him.

The defendant must pay the costs.

WRIGHT, J., concurred.

Solicitor for the appellant: *D. R. Hilliard.*
Solicitor for the respondent: *T. Lynch.*

A. E. R. J.

MURPHY *v.* MIDLAND GREAT WESTERN RAILWAY OF IRELAND CO. (1).

(1900. No. 8615.)

Railway Company—Condition—Reasonableness—Claim to be made within specified time—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Parties—Principal and agent—Right of agent to sue—Amendment of pleadings.*

The plaintiff purchased thirty head of cattle at Moate, and had them booked to Carlisle, under a through contract with the defendant Company. The cattle were not booked by the plaintiff himself, but by a man sent by him, who signed the contract note "on owner's behalf." In the freight note, which was referred to in the contract note, the plaintiff was stated to be the owner. The defendants have, as the plaintiff knew, two rates for the carriage of live stock, a higher and a lower. The cattle here were, by plaintiff's direction, sent at the lower. The defendants undertake a more extended liability at the higher rate; but in each case the stock are carried subject to a condition that no claim in respect of live stock, for loss, injury, or delay, will be allowed unless made in writing, in case of injury or delay, within three days after delivery, such delivery to be deemed complete at the termination of the transit, or, in

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and WRIGHT, JJ.

K. B. Div. 1901.

MURPHY v. M. G. W. (IR.) RAILWAY CO.

case of loss, within seven days after the time when the live stock should, in the ordinary course, have been delivered. The signed contract in the present case contained this condition. On the passage between Dublin and Holyhead fifteen of the cattle were killed and fifteen injured. The dead cattle were sold by the defendants for the value of their hides. No claim in writing was made in respect of the loss or injury within either three or seven days. The statement of claim contained counts claiming damages for breach of contract and breach of duty in not safely carrying the cattle, and not providing a proper vessel, and also counts in trover and detinue in respect of the dead animals. The statement of defence relied on the above condition as a defence to all the causes of action; and, as a further defence to the counts in trover and detinue, denied that the cattle were the plaintiff's, but there was no traverse of the plaintiff's property in the cattle in respect of the claim for not carrying safely. At the trial the plaintiff admitted that he was not the owner of the cattle at the time of the injury, but had purchased them for one C., since deceased, and the jury found that they were the property of C. Before action brought, C.'s executors had made a claim in respect of the loss of the cattle. Subsequently an arrangement was made between plaintiff and C.'s executors, by which the ownership became vested in plaintiff:—

Held (*per* Lord O'Brien, L.C.J., and Wright, J., *diss.* Gibson, J.), that the plaintiff was not entitled to recover on any of the counts, on the ground that the cattle belonged not to the plaintiff but to C.; that the plaintiff, in making the contract with the defendants, was acting merely as agent for C., and defendants had notice of this before action; and that the defendants should be allowed to amend their defence by traversing the contract and the property in the cattle in relation to the counts for not safely carrying; also, *per* Lord O'Brien, L.C.J., on the further ground that the condition in question was just and reasonable.

Held (*per* Gibson and Wright, JJ., *diss.* Lord O'Brien, L.C.J.), that the condition in question was not just and reasonable, and no fair alternative being offered, was void.

Held also (*per* Gibson and Wright, JJ.), that such condition was one "with respect to the receiving, forwarding, and delivering of animals, goods, or things" within the meaning of the 7th section of the Railway and Canal Traffic Act. *Dictum* to the contrary of Fitz Gerald, J., in *Moore* v. *Great Northern Railway Co.* (10 L. R. Ir., at p. 106) disapproved of.

Held (*per* Gibson, J.), that the denial of the plaintiff's property in the cattle being confined in the statement of defence to the counts in trover and detinue, the plaintiff was entitled to succeed on the counts in contract for not safely carrying, and that, having regard to the course of the trial, the defendants should not be allowed to amend their defence—at all events, except upon terms of the defendants paying all costs up to the date of amendment.

Held (*per* Gibson, J.), A condition by a Railway Company, that in respect

of animals booked through by them or their agents for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, the Company shall be exempted from liability for any loss, damage, or delay which may arise during the carriage of any such animals by sea from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, in the same manner as if the Company had signed and delivered to the consignor a bill of lading containing such condition, is a just and reasonable condition.

NEW TRIAL MOTION.

The action was brought by the plaintiff, who was engaged in the cattle trade, for loss of and injury to certain cattle. The plaintiff bought thirty head of cattle at Moate, in county Westmeath, on the 2nd October, 1899, and early that morning had them booked to Carlisle to a man named Coyle, under a through contract with the defendant Company. The plaintiff did not book the cattle himself, but sent a man named Creevy to do so, giving him the amount of the freight. The contract note was signed by Creevy "on owner's behalf," the plaintiff's name not appearing; but in the freight note, which was referred to in the contract note, the plaintiff was stated to be the owner. The defendant Company have two rates, at either of which cattle may be consigned at the sender's or owner's option:—Rate A, when the Company convey the cattle on conditions A, as specified in the contract note; and rate B, a reduced rate at which, when adopted by the sender or owner, the Company convey the cattle on conditions B, as specified in the contract note, rate A being somewhat less than one-fifth higher than rate B. In the present case the cattle were booked at rate B, the lower rate, by the plaintiff's directions, and the contract note signed by Creevy incorporated conditions B. These conditions were as follows:—

CONDITIONS B.

1. No claim in respect of live stock for loss, injury, or delay, for which the Company may be liable, will be allowed unless the same be made in writing in the case of injury or delay within three days after delivery of the live stock in respect of which the claim is made, such delivery to be considered complete at the termination of the transit; or, in the case of loss, within seven days after the time when the live stock should in the ordinary course have been delivered.

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2. After the termination of the transit the live stock will be subject, in addition to the charge for carriage, to a further charge for demurrage of 3*s.* per truck per day until unloaded, and after unloading to a reasonable charge for lairage or other accommodation or service. Provided that no such charge shall be made if the Company have not given proper opportunity for the removal of the live stock or the discharge of the truck.

3. Consignors ordering trucks and failing to load and order them away within twenty-four hours after such trucks shall be ready for loading at the station or siding to which they were ordered will be subject to a charge of 3*s.* per truck per day for demurrage for every day or fraction of a day they shall be detained, after the expiry of such twenty-four hours.

4. All live stock delivered to the Company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such live stock, and also to a general lien for any other moneys due to them from the owners of such live stock upon any account; and in case such lien is not satisfied within a reasonable time from the date upon which the Company first gave notice to the owners of the live stock of the exercise of the same the live stock may be sold by the Company by auction or otherwise, and the proceeds of sale applied to the satisfaction of every such lien and expenses.

5. The Company will not be liable for the loss of or for any injury done to live stock in the receiving, forwarding, or delivering thereof, except upon proof that such loss or injury was caused by neglect or default on the part of the Company or their servants.

6. The Company will not be liable for any loss of market.

7. The Company will not be liable for any indirect or consequential damages in respect of live stock lost, injured, or delayed.

8. In all cases where the Company's charges are not prepaid, the live stock is accepted for carriage only upon the condition that the sender remains liable for the payment of the amount due to the Company for the carriage of such live stock, without prejudice to the Company's rights, if any, against the consignee or any other person.

9. When the reduced rate is elected, the Company will not be accountable for any loss caused by delay, or injury to horses, sheep, cattle, pigs, or other live stock, taking place upon the premises of any Steamship or Shipping Company, or any quay, wharf, or yard, used by such Steamship or Shipping Company, before, at, or after shipment, or on the passage, or on the premises, of any Steamship or Shipping Company, or any quay, wharf, or yard, used by such Steamship or Shipping Company, at or after landing, nor for any loss of or injury to any such live stock, whether arising from or consequent upon the dangers or accidents of the seas, rivers, harbours, or navigation, or from the act of God, the Queen's enemies, pirates, restraints of princes, rulers, or people, jettison, barratry, collision, stranding, fire, improper, careless, or unskilful navigation, or from accidents connected with machinery or boilers, or from any

fault, negligence, or mistake of the master, pilot, officers, seamen, or crew of the vessels, or other servants of the Company; or of the owners of the vessels.

10. The Company who own the vessels will give a free passage to the owners going, or their man sent to take charge of live stock, upon condition that they so travel at their own risk.

Conditions A contain nine conditions, the first being as follows:—

In respect of any animals booked through by them or their agents, partly by railway and partly by sea, or partly by canal and partly by sea, the Company shall be exempted from liability for any loss, damage, or delay which may arise during the carriage of any such animals by sea, from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, in the same manner as if the Company had signed and delivered to the consignor a bill of lading containing such condition.

The remaining conditions corresponded with conditions 1–8 of conditions B, condition 2 of conditions A being identical with condition 1 of conditions B.

The train containing the cattle left Moate about 1.30 p.m., and arrived at the North Wall about 7.30 p.m., too late for the cattle to be put on board the boat which was starting that night; but the next morning they were shipped for Holyhead on board the "Duchess of Sutherland," a cattle-boat belonging to the London and North Western Railway Company, being placed in the "'tween decks." On arrival at Holyhead fifteen of the cattle were found to be dead and fifteen injured. The injured cattle were sent on to Carlisle to an agent of the plaintiff, and the dead animals were sent to Chester and sold by defendants for £15 15*s.*, the value of their hides. For the purpose of the present report it may be taken as admitted that no claim in writing was made in respect of the loss or injury within either three or seven days, as required by condition 1 of conditions B.

The action was commenced on the 29th June, 1900. The statement of claim, in addition to counts claiming damages for breach of contract and breach of duty to carry the thirty head of cattle safely, and to provide a proper steamship for the sea journey, also contained counts in trover and detinue for the conversion and

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detention of the fifteen cattle which were killed. The defendants in their statement of defence, by way of defence to all the causes of action, relied on condition 1 of conditions B, embodied in the signed contract. They also, as to the counts in trover and detinue, denied that the cattle were the plaintiff's; and, as a further defence to these counts, brought the sum of £15 15*s.* into Court with a plea denying liability. They did not traverse the plaintiff's property in the cattle with respect to the claims for not carrying safely. The plaintiff, in his reply, in addition to joining issue, pleaded that, as to so much of the defence as relied on a special contract, the defendants did not offer to the plaintiff a reasonable alternative rate.

The action was tried before Mr. Justice Madden and a special jury of the county of the city of Dublin on the 31st April, 1901, and three following days, and evidence was given as to the matters above mentioned. Evidence was also adduced on behalf of the plaintiff with a view to showing that the loss and injury happened by reason of the "'tween decks" being insufficiently ventilated. The plaintiff admitted on cross-examination that he knew the two rates well; that he knew one was a little higher than the other; and that he chose the lower one and sent Creevy to book at such lower rate, giving him the exact sum for it. The plaintiff was also cross-examined with a view to showing that he was not the owner of the cattle, but had purchased them for Coyle. His evidence on this point was as follows:—"I was partly his (Coyle's) buyer and partly interested." "I have settled my business with Coyle's executors since I was buying cattle for Coyle, but I was interested in the cattle." "I bought these cattle for Coyle." "I am the owner of the cattle now; I was not then; I was not the owner in November, because my business with Coyle's executors was not settled. I paid for them." "I purchased the cattle with my own money. There was never any arrangement between me and Coyle, only that I got a certain amount at the end of every year on the work done. I paid for the cattle, and he sent me the money as soon as I paid. It might be two or three years before there was a settlement on the work." "Coyle did not pay a percentage. He gave just what he liked." "I sent Coyle the prices of the cattle for each fair as I bought them." It appeared

that Coyle died on the 27th October, 1899, and that on the 27th November following the solicitor for his executors wrote to the manager of the London and North Western Railway Company as follows:—"I am acting for the executors of the late Mr. James Coyle, of Bridge End. It appears that of a lot of cattle shipped by his buyer (Mr. Michael Murphy, Ballinrobe), at the North Wall, for England, some time in September or October last, fifteen were killed on board the Company's boat. Kindly let me know the amount payable to the deceased in respect of each animal lost. I require these particulars to set out in the schedule of assets of deceased's property. Your prompt attention will oblige." Subsequently an arrangement was come to between the plaintiff and Coyle's executors, by which the ownership of the cattle became vested in the plaintiff.

At the close of the plaintiff's case, the defendants' counsel asked for a direction on the counts for trover and detinue, on the ground that Coyle was the true owner of the cattle and alone competent to sue; and also asked for a direction on the counts for loss in the sea voyage, on the ground that a reasonable alternative rate had been offered to the plaintiff, and that the condition requiring a claim to be sent in within a specified time had not been complied with. Plaintiff's counsel contended that on the evidence plaintiff was the owner of the cattle, and asked to have the question of trover and detinue left to the jury; also, as regarded the condition, that no reasonable alternative was offered. The learned Judge said he would leave to the jury the several questions of fact raised by the pleadings in regard to which there appeared to be evidence. Evidence was then gone into by the defendants, principally with a view to showing that the loss and injury arose from the stormy weather which prevailed, and not from insufficient ventilation.

At the close of the evidence, counsel for the plaintiff, amongst other requisitions, asked for a ruling that conditions A did not afford a reasonable alternative, and that condition 1 of conditions B, if it was to be interpreted as protecting the defendants, from loss or injury, however caused, whether wilfully, wrongfully or otherwise, if no claim sent in within the time, was unreasonable. The defendants' counsel again asked for a direction on a number

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of grounds, amongst others on the ground that there was no evidence that the cattle were the plaintiff's. Several questions were left to the jury, but they were unable to agree on any of them, with the exception of one, viz. as to the ownership of the cattle which they found to be Coyle's. The learned Judge, being of opinion that the alternative offered to the plaintiff was a reasonable one, directed a verdict for the defendants, and gave judgment for them, with costs.

The plaintiff now moved to have the verdict and judgment set aside and a new trial directed.

Serjeant Dodd (with him *Cherry, K.C.*, and *Mark B. Cooper*), for the plaintiff:—

We contend, first, that the condition requiring a claim is not just and reasonable, because (*a*) the time allowed to make a claim is insufficient, having regard to the length and nature of the journey, and also to the fact that the condition applies to live stock; these might sustain latent injuries which would not develop within three days; (*b*) the condition would protect not merely from negligence, but from wilful misconduct on the part of the defendants' servants, and is therefore void, whatever length of time might be allowed. We admit that if the conditions offered in conditions A are reasonable we would be bound by the condition as to time in conditions B; but clause 2 in conditions A is identical with clause 1 in conditions B. We challenge this, as not offering any reasonable alternative, and therefore we are not bound by conditions B. We further say clause 1 of conditions A is not reasonable; but we rely mainly on clause 2: *Doolan* v. *Midland Great Western Railway Company* (1); *Manchester, Sheffield and Lincolnshire Railway Company* v. *Brown* (2); *Lewis* v. *Great Western Railway Company* (3); *Peek* v. *North Staffordshire Railway Company* (4); *Beal* v. *South Devon Railway* (5); *Ashendon* v. *London, Brighton and South Coast Railway* (6). *Lewis* v. *Great Western Railway Company* (7) will be relied on by the defendants, but that case is distinguishable, the condition there did not apply

(1) 2 App. Cas. 792.
(2) 8 App. Cas. 703.
(3) 3 Q. B. D. 195.
(4) 10 H. L. Cas. 473.
(5) 3 H. & C. 337.
(6) 5 Ex. D. 190.
(7) 5 H. & N. 867.

to live stock but to inanimate goods, the journey was a short land journey, and the case of wilful misconduct was excluded. The point was not decided in *Simons* v. *Great Western Railway Company* (1).

[GIBSON, J., referred to the observation of Cockburn, C.J., in *Garton* v. *Bristol and Exeter Railway Company* (2)].

Secondly. The condition here is not one "with respect to the receiving, forwarding, and delivery of animals, goods, or things," within the 7th section of the Railway and Canal Traffic Act, 1854, but relates to something to be done afterwards: *Moore* v. *Great Northern Railway Company* (3), *per* Fitz Gerald, J. Independently therefore of any question of reasonableness, the condition is void, since by the section the Company can only limit their liability with respect to the receiving, forwarding, and delivery. Considered in this light the *dictum* of Fitz Gerald, J., is in our favour.

Thirdly. Even assuming the condition to be good, it does not cover loss or injury arising, as in the present case, from the faulty construction of the vessel.

Gordon, K.C., and *Gerald Fitz Gibbon* (with them *O'Shaughnessy, K.C.*), for the defendants:—

As to the third point relied on for the plaintiff, there is no evidence of faulty construction.

As to the reasonableness of the condition, *Lewis* v. *Great Western Railway Company* (4) is exactly in point; it was decided in 1861, and has been treated as a binding decision in all the text-books; it was cited and not questioned in *Lloyd* v. *Waterford and Limerick Railway* (5). In *Moore* v. *Great Northern Railway Company* (3) a similar condition with respect to inanimate goods was considered reasonable. The observations of Cockburn, C.J., in *Garton* v. *Bristol and Exeter Railway Company* (2) were merely made casually during the argument, and had nothing to say to the question for decision there. *Peek* v. *North Staffordshire Railway Company* (6) does not apply, since the condition here

(1) 26 L. J., C. P. 25, at p. 31; 18 C. B. 805.
(2) 1 B. & S. at p. 146.
(3) 10 L. R. Ir. at p. 106.
(4) 5 H. & N. 867.
(5) 15 Ir. C. L. R. 37.
(6) 10 H. L. Cas. 473.

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does not amount to a total exclusion of liability, but merely fixes a time limit for making claims. It is reasonable that the defendants should have an early opportunity of making inquiries as to how an injury happened, and in what condition the cattle left their premises. The time limit here is not unreasonable, having regard to the modern facilities of communication by post and telegraph. As to condition 1 of conditions A, it is taken from 31 & 32 Vict. c. 119, s. 14, the only difference being that the Company are exempted from liability for delay, as well as for loss or damage.

In any event, the plaintiff here cannot sue. He was merely a buyer for Coyle, and had no property in the cattle. The contract note is signed "on owner's behalf"—that is on behalf of Coyle: *Sargent* v. *Morris* (1); *Cork Distilleries Company* v. *Great Southern and Western Railway Company* (*Ireland*) (2).

Cherry, K.C., in reply :—

The plaintiff has a sufficient interest to maintain the action; he is described as owner in the freight note, which is referred to in the contract note, and defendants are therefore estopped from setting up the *jus tertii*: *Freeman* v. *Birch* (3); *Dunlop* v. *Lambert* (4); *Atkins* v. *Amber* (5); Evans on Principal and Agent, 2nd Ed., p. 457; Russell on Mercantile Agency, p. 194; Chitty on Contracts, 13th Ed., p. 277. Trover lies for the sale of the dead bodies: *London and North Western Railway Company* v. *Hughes* (6).

The condition is unreasonable. It is unreasonable to require a claim in writing; this was not required in *Lewis* v. *Great Western Railway Company* (7). The time limit is too short; even if the consignee has a person to receive the cattle at their destination, such person should have an opportunity of communicating with his principal; the principal may be moving about from place to place.

The injury and loss here are not covered by the condition.

(1) 3 B. & Ald. 277.
(2) L. R. 7 H. L. 269.
(3) 1 Nev. & Man. 420.
(4) 6 Cl. & F. 600.
(5) 2 Esp. 493.
(6) 26 L. R. Ir. 165.
(7) 5 H. & N. 867.

The defendants are liable on an implied warranty to provide a vessel reasonably fit for the carriage of cattle: *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Company* (1); *Tattersall* v. *National Steamship Company* (2); *Owners of Cargo on Ship Maori King* v. *Hughes* (3).

Cur. adv. vult.

1902. Jan. 18.

WRIGHT, J. :—

This was an action brought by the plaintiff, who resides at Ballinrobe, in the county of Mayo, against the defendants for loss of and injury to cattle which were being carried from Moate, in Westmeath, to Carlisle. The facts, so far as material, may be shortly stated.

The plaintiff, who is engaged in the cattle trade, bought thirty head of cattle at Moate Fair on the 2nd of October, 1899, and early on that date booked them to Carlisle, under a through contract; the train carrying the cattle left Moate at about 1.30 p.m., and reached the North Wall about 7.28 p.m., too late to enable them to be put on board the boat, which started that night. Next morning the cattle were with others loaded on board the "Duchess of Sutherland," a vessel owned by the London and North Western Railway Company, and which has been used in the cattle carrying trade for the past twenty-five years, the cattle being placed in the 'tween decks. The steamer left next morning about 10 a.m., and reached Holyhead at 3.40 p.m. On the voyage, and owing, it was alleged, to insufficient ventilation, fifteen of the cattle were smothered and died, and the remaining fifteen were more or less injured; the dead cattle were sent on to Chester, and sold there for the value of the hides, the amount realised being £15 15*s*. The fifteen living cattle were sent on to Carlisle, and were received there by Patrick Denny, cattle dealer, who acts for the plaintiff; they were, it was alleged, more or less injured. The cattle were booked for the plaintiff at Moate by a man named Creevy, who signed the contract note, the original of which has been given in evidence, from which it appears that the Company have two rates at either of

(1) [1898] 1 Q. B. 567. (2) 12 Q. B. D. 297. (3) [1895] 2 Q. B. 550.

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which cattle may be consigned at the sender's or owner's option, distinguished as rate A and rate B. Rate A, when the Company convey on conditions A, as set out in the contract note, and rate B, a reduced rate at which, when adopted by the owner or sender, the Company convey on the conditions B, also set out in the contract note as applicable respectively to the land and sea portions of the journey. The cattle in this case were booked under rate B, or reduced rate, and it was admitted by the plaintiff on cross-examination that he knew the two rates well, and that one was a little higher than the other, and that he elected to send the cattle by the lower rate. The plaintiff was also cross-examined with a view to show that he was not the true owner of the cattle, but was only a buyer for a cattle dealer, named Coyle, who died on the 27th October, 1899. The evidence on this latter question I shall refer to later on.

Several other witnesses were examined for plaintiff, and at the close of plaintiff's evidence counsel for the Railway Company contended that there was no case to go to the jury, and asked the learned Judge so to direct, and handed in a number of written requisitions. The Judge, however, said he would leave to the jury the several questions of fact raised by the pleadings, whereupon evidence was given for the defendants.

Several questions were then left to the jury, upon none of which, with one exception, were they able to agree; and at the end the learned Judge directed a verdict for the defendants, being, as he reports, of opinion that the alternative offered to the plaintiff was a reasonable one. The plaintiff now moves to have this ruling set aside as being a misdirection, and for a new trial, and the case has been argued at great length, and we have been referred to a great number of authorities.

Practically two questions arise: It is admitted that no notice of claim in writing was given within either three days or seven days, as required by condition 1 of conditions B. This condition, it will be seen, is identical in language with condition 2 of conditions A, the conditions attached to the alternative rate; and the first and main question argued before us was whether this condition was just and reasonable within section 7 of the 17 & 18 Vict. c. 31, plaintiff contending that this condition in A is not just

and reasonable, and accordingly that no fair alternative was offered. The case mainly relied on by the defendants was *Lewis* v. *Great Western Railway* (1), decided in the year 1860, in which the condition was as follows: "No claim for deficiency, damage, or detention, will be allowed unless made within three days after delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered." This decision was apparently followed in two or three reported cases. Early in the argument it was pointed out by my brother Gibson that the decision in that case was made before the decision of the House of Lords in *Peek* v. *North Staffordshire Railway Company* (2) (decided in 1863), prior to which great uncertainty prevailed as to the meaning of this section 7; that the true meaning and effect of the section was then first authoritatively declared; and that this decision renders of little value any previous decisions. In *Peek's Case* (2) the Railway Company refused to carry the goods at all unless the customer either consented that they should be carried without liability for neglect or default, or agreed to pay whatever amount the Company chose to fix as an insurance. Such a condition was held by the majority of the members of the House of Lords to be unreasonable. Lord Wensleydale uses the following language:—"What, then, is the meaning of the alleged condition? Does it mean to protect the Company from all liability however occasioned? Or, is there an implied exception of the default or neglect of the Company, or its servants? I think it impossible to give this construction to the alleged condition, for the condition is pleaded in bar to the *whole* cause of action. The condition must be proved to apply to loss or damage of every kind, in order to sustain the plea. To be a good plea in the limited sense, it should have been pleaded in bar to all, except to that part of the damage which was caused by the neglect or default of the Company and its servants; probably the principal part of the damage sustained. As the plea is pleaded, it is unquestionably meant as an answer to the whole damage sustained. In that sense it is quite clear that the condition was unreasonable" (pp. 577–8).

In the case of *The Manchester, Sheffield, and Lincolnshire*

(1) 5 H. & N. 867. (2) 10 H. L. Cas. 473.

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Railway Company v. *Brown* (1), Lord Watson uses the following language in speaking of *Peek's Case* (2):—" We are not dealing with a case in its circumstances similar to that, because it was there held that the Company had charged a high rate as common carriers, not for the honest and *bona fide* purpose of giving an alternative to the trader, but practically with the view of giving no alternative and compelling him to adopt one rate in preference to the other " (p. 716); and in that case a signed contract relieving the Company from all liability for loss or damage by delay in transit, or from whatever other cause arising, in consideration of the rates being one-fifth lower than where no such undertaking was granted, was held to be in point of fact just and reasonable within the Act 17 & 18 Vict. c. 31, as the fish merchant had a *bona fide* option of sending fish at a reasonable rate with the liability on the Company as common carriers, or at the lower rate upon the terms of the contract.

To refer to a third House of Lords authority: *Great Western Railway Company* v. *M'Carthy* (3), Lord Herschell says: —" I think the law upon some of the points that arise is conclusively settled by authority. It is not open to doubt since the case of *Peek* v. *North Staffordshire Railway Company* (2), that a contract exempting the Company from liability in the terms of the consignment note in the present case is *prima facie* not just and reasonable; and that if no other alternative is offered to the consignor, the Company are liable for the negligence of their servants, notwithstanding the stipulations of the contract of carriage. It is equally well settled, since the decision of your Lordships' House in the case of *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (1), that if the consignor has an offer *bona fide* made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses, in consideration of a pecuniary benefit, to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be so. It appears to me that all the questions in the present case resolve themselves into this one: Was the alternative offered to the plaintiff, and which it

(1) 8 A. C. 703. (2) 10 H. L. Cas. 473. (3) 12 A. C. 218, at 228.

was open to him to accept in lieu of that contained in the contract which he in fact entered into, a just and reasonable one?"

The law has thus been settled, and the considerations which should guide the Court or a Judge in deciding whether conditions made by a railway company under section 7 of the 17 & 18 Vict. c. 31, are just and reasonable, have been declared in these three decisions. Prior to *Peek's Case* (1) (in 1863), and at the time when *Lewis' Case* (2) was decided, most undoubtedly the law had not been thus authoritatively stated.

In *Lewis's Case* (2) there was apparently no alternative offered. Pollock, C.B., in his judgment (p. 873) says: "Such a condition is perfectly reasonable; the law allows persons to make their own bargains in matters of this sort"—a proposition which cannot, I think, be supported. Channell, B., and Bramwell, B., concur in holding that the condition was reasonable.

A somewhat similar but more stringent condition was considered in *Simons* v. *Great Western Railway Company* (3), an earlier case decided in 1856; the condition was in these terms:—"No claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered." It arose on the argument of a demurrer, and, while I can find no judgment of the Court deciding that this condition was reasonable beyond the *dictum* of Cresswell, J. (4), "I do not see anything necessarily unreasonable in that," that appears to have been the view of the Court, if the marginal note (p. 805) be taken as correct.

The case of *Moore* v. *The Great Northern Railway Company* (5) was relied on for the defendants. The portion of the judgment of Mr. Justice Fitzgerald dealing with this particular point is very short:—"We incline to think," he says, "that this condition applies to inanimate goods and not to cattle." As to that, I think, in the particular case he was right; because it will be found, on referring to the conditions which are printed at pages 98 and 99 of the Report, that some of the conditions deal with "animals and goods," some with "goods" alone; but the learned

(1) 10 H. L. Cas. 473.
(2) 5 H. & N. 867.
(3) 18 C. B. 805; 26 L. J. C. P. 25.
(4) 18 C. B. at p. 821.
(5) 10 L. R. Ir. 95, 106.

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Judge, in his judgment, proceeds: "And further, we desire to point out that the conditions which the Court or a Judge is to determine under the statute to be just and reasonable are 'with respect to the receiving, forwarding, and delivering of animals, goods or things.' The 8th condition relates to something to occur after delivery." In this view I am wholly unable to concur. I think the condition in that case, as in this, is a condition relating to the delivery, that is to say, it is a complaint in the one case—namely, total loss—of non-delivery, and in the other of delivery in a damaged or deteriorated condition, and is a condition under section 7, and one which must be just and reasonable.

The reasonableness of a condition embodying this time limit was considered by the English Queen's Bench in the case of *Garton* v. *Bristol and Exeter Railway* (1), the 4th condition containing the same time limit as in *Simons' Case* (2), almost the same as that in *Lewis' Case* (3), will be found set out in the report at p. 143; and Cockburn, C. J., at p. 146, expresses a strong doubt of the reasonableness of the condition:—"The Court of Common Pleas seem there" (in *Simons' Case* (2)) "to intimate an opinion on a point which it was not necessary to decide, namely, that the condition that 'no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered,' is just and reasonable within the statute—a proposition which, with great deference to that Court, I consider very questionable."

Having regard to the decisions of the House of Lords, starting with *Peek's Case* (4), *Brown's Case* (5), and *M'Carthy's Case* (6), I think I am at liberty to examine into *Lewis' Case* (3), and am not bound by it if I do not think it would now be so decided by the light of these House of Lords' decisions. I, accordingly, take the contract note in the present case, and proceed to consider the condition in question, its nature and effect. It certainly would cover injury or loss arising from the wilful misconduct of the

(1) 1 B. & S. 112.
(2) 26 L. J., C. P. 25; 18 C. B. 805.
(3) 5 H. & N. 867.
(4) 10 H. L. Cas. 473.
(5) 8 A. C. 703.
(6) 12 A. C. 218.

Company's servants, and in this respect it goes beyond any of the reported cases to which we have been referred during the argument. In *Great Western Railway Co.* v. *M'Carthy* (1) there was a condition, where cattle were carried under the reduced rate, relieving the Company from liability except upon proof that the loss, damage, or delay arose from wilful misconduct on the part of the Company's servants; while at the higher rate the Company took the ordinary liabilities of carriers. In *Lewis* v. *The Great Western Railway* (2) there were two rates—the higher, when the Company took the ordinary liability of carriers, and a lower rate, when they were relieved of all liability except that arising from the wilful misconduct of their servants; and at page 209, Brett, L.J., expresses himself as follows:—"Therefore, the contract having this exception of the wilful misconduct of the defendants' servants, I think we ought to say that the conditions here are just and reasonable."

In *Ashendon* v. *London, Brighton and S. C. Railway Co.* (3) a condition that a Railway Company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values, unless the value is declared, was held to be not just or reasonable within section 7 of the 17 & 18 Vict. c. 31, as being in its terms unconditional, and one which would, if valid, protect the Company even in case of the negligence or the wilful misconduct of their servants. Hawkins, J., at p. 192, says, "It is clear that it" (the condition) "was, as the law is now settled" (*i.e.* in *Peek's Case* (4)), "unreasonable; for it was framed to cover every loss, even though occasioned by the wilful misconduct of the defendants, or their servants"; and he holds that the case of *Harrison* v. *London, Brighton and South Coast Railway Co.* (5), decided in 1860 by the Exchequer Chamber, in which the condition was the same, should be considered to be virtually overruled by *Peek's Case* (4).

I further think the time limit is too short, and that the condition is on this ground objectionable. Cases may occur of injury latent, and undeveloped until after, perhaps, a considerable time after the three days from delivery had expired; and on this ground I think

(1) 12 A. C. 218.
(2) 3 Q. B. D. 195.
(3) 5 Ex. D. 190.
(4) 10 H. L. Cas. 473.
(5) 2 B. & S. 122.

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the condition is unfair as regards the carriage of live stock. The condition, too, would protect the Company in cases where there was no one to give the notice, *e.g.* if the owner travelling with the cattle had been killed in a collision or accident in which the cattle were killed or injured, and even though the Company knew perfectly well of the nature and extent of the loss. Further, this is a through contract, covering the whole route the cattle are to take—in the case in question involving a railway journey in Ireland, a sea voyage from Dublin to Holyhead, and a land journey from Holyhead to Carlisle; in other cases, under like contracts, the journey may be much longer and take greater time; while in *Lewis* v. *Great Western* (1) the journey was a short land journey of about forty miles, from Shifnal to Wrexham. I quite admit that the owner should have, as in practice invariably he has, I believe, some one at the end of the route to take delivery of the cattle; and such person can of course see, and should report to his employer, any injury to the cattle; yet a reasonable time for communicating with his employer ought to be allowed. There may be some delay in communicating; men engaged in the cattle trade are not generally stationary—they move about from fair to fair; there must often be some delay in a letter or telegram reaching them; and on this ground, too, I am of opinion that the time limit is too short, and is unfair to one of the parties to the contract. For all these reasons, I am of opinion that the condition in question, condition 2 of A (corresponding to condition 1 of B) is not just and reasonable; that no fair alternative was offered, and, accordingly, that the direction of the learned Judge cannot on this ground be upheld.

This disposes of the main contention in the case—one of great importance to cattle dealers and to the carrying companies; in fact, of such importance that we were informed early in the argument that the case would be carried to the ultimate Appellate Tribunal.

The second question in the case is as to the right of the plaintiff to maintain this action. From the outset it was contended, on behalf of the defendants, that plaintiff had no right to

(1) 5 H. & N. 867.

sue, on the ground that he was not the owner of the cattle, but only buyer for a man named Coyle. The evidence on that point is contained in the cross-examination of the plaintiff. He says he was partly buyer for Coyle and partly interested (which must be interpreted, I think, by the rest of his evidence to mean nothing more than that Coyle used to pay him for his trouble in buying and going about to fairs, and occasionally give him a commission or present). The money to buy the cattle was always found by Coyle, either provided in advance or repaid by him; but in truth the evidence of the plaintiff leaves no doubt as to his true position. He says: "I am the owner of the cattle now," by the effect, as I understand his evidence, of the adjustment of certain accounts between him and Coyle's executors (it appears that Coyle died on the 27th October, 1899); "I was not the owner in November, 1899"; and to the Judge, "I bought these cattle for Coyle"—he was nothing more than Coyle's buyer, exactly what he is termed in a letter of Mr. Loughrey, solicitor for Coyle's executors; and, in answer to a question left to the jury as to the ownership of the cattle, they found that they were Coyle's. This finding has not been quarrelled with; and indeed I do not see how, on the uncontradicted evidence, the jury could have found otherwise. It is argued for the defendants that the action should have been brought in the name of Coyle's representative, and that he, and he only, could sue.

Generally speaking, the right to sue goes with the property in the goods, and where the goods are delivered to a carrier to deliver to a consignee, the latter is the proper person to bring the action: *Dunlop* v. *Lambert* (1); *Coombs* v. *Bristol and Exeter Railway Company* (2). No special contract was made in this case. Murphy had parted with the cattle. It is clear that Murphy in buying the goods, and in making the contract with the Company, and delivering the cattle to them, was acting as agent for Coyle, and before action the Company had notice of this by letter of Mr. Loughrey, solicitor for his executor, dated November 27th, 1899, which is in the following terms: "Dear Sir, I am acting for the executors of the late Mr. James Coyle of

(1) 6 Cl. & F. 600, 620, 626, 627. (2) 3 H. & N. 1, 510.

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Bridge End. It appears that of a lot of cattle shipped by his buyer (Mr. Michael Murphy, Ballinrobe) at the North Wall for England sometime in September or October last, fifteen were killed on board the Company's boat. Kindly let me know the amount payable to the deceased in respect of each animal lost. I require these particulars to set out in the schedule of assets of deceased's property. Your prompt attention will oblige." The jury have found that Coyle was the owner of the cattle. This is not the usual or common case of vendor and vendee; it is a case of principal and agent, and the true owner coming forward before action and claiming the cattle as his. In my opinion, the counts for trover and detinue cannot be sustained; nor can the other counts founded on contract and breach of duty, as on the true facts the parties to the contract were Coyle, through his agent Murphy, and the Company; and the cattle delivered by Murphy to the Company were not his but Coyle's, for whom he was acting. If it be necessary to amend the pleadings, as in my opinion it is, by traversing the contract and traversing the property in the cattle under the earlier counts, I think where the true facts are before the Court, and where it is clear from the course of the trial that the right of Murphy to maintain the action was challenged from the first, and no surprise can be suggested, such leave ought to be given. It may be said that this is not a meritorious defence, and that the real question in controversy is the first and more important one, as to the reasonableness of the condition. I do not, however, take this view. A Railway Company comes into Court to protect itself against a claim which it rightly believes to be on several grounds unfounded. Its aim is not to settle great questions of law, and add a page to legal history. Its single desire is to win. The Company does not wish to have a verdict entered against it at the suit of a wrong plaintiff, Murphy, when on the true facts it could be sued the next day by Coyle's executors. I think leave to amend would, as a matter of course, be given to an ordinary party defendant. I don't see that a Company defendant is entitled to less consideration, merely because it is a Company. I therefore think judgment ought to be for defendants.

GIBSON, J. :—

This case presents the following points for decision :—I. Was the alternative offered reasonable. II. Does condition 9 in the special signed contract exonerate the defendants from liability for unfitness of the vessel, and was there evidence of such unfitness. III. Was the sale of the dead cattle wrongful conversion. IV. Could the plaintiff sue in trover. V. Could he sue in contract.

The conditions in columns A and B were the same, save that condition 9 in B exempts from negligence in the sea part of the journey, and condition 10 in B is added. It was stated at the Bar that these conditions for through traffic were adopted nine or ten years ago. They cannot, however, have been uniformly acted on, as the conditions set out in *Curran's Case* (1) are different. When I was at the Bar a time-limit condition was never introduced in the alternative.

I. The objection to the reasonableness of the alternative was based on conditions 1 and 2. Condition 1 follows the statute 31 & 32 Vict. c. 119, s. 14, but introduces the words "or delay." The addition is material, for "delay" cannot be restricted in the condition to delay causing temporary loss: *Hearn's Case* (2); *Millen's Case* (3). Apart, however, altogether from the statute, the condition seems reasonable, as it does not extend to negligence.

The real controversy was on condition 2. It was impugned on three grounds: (1) no condition at all limiting claims for negligence or misconduct is competent; (2) even if a condition might be made limiting such claims, this condition is unreasonably wide; and (3) the time limit was unreasonable.

The first head of objection was in turn resolved into three points: (*a*) no condition could limit claims for negligence; (*b*) even if it could, claims in respect of wilful misconduct could not be so limited; (*c*) the condition does not relate to delivery, but to something subsequent to delivery, and being outside the proviso in sect. 7 of the Act of 1854, is an unlawful attempt to evade statutory liability.

The construction of the condition was not disputed. It plainly extends to claims for loss or injury however caused, and includes

(1) [1896] 2 I. R. 183. (2) 10 Ex. 793. (3) 10 Q. B. D. 142.

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claims for negligence and wilful misconduct: *Peek's Case* (1); *M'Nally's Case* (2); *Cutler's Case* (3).

1 (*a*). The first ground of objection, viz. that sect. 7 invalidates any condition restricting claims for negligence, is, I think, not well founded. According to Wright, J., in *Shaw's Case* (4) the section relates only to negligence, or default in the nature of negligence; and in other cases freedom of contract remains unaffected. In order to give the proviso as to reasonable conditions any substantial operation, it must refer to and qualify the liability imposed by the section. This was obviously the opinion of Lord Wensleydale in *Peek's Case* (5), though Pollock, C.B., seems to have held a different view (6). I am not aware of any decision directly in point. In *Beal's Case* (7) negligence was expressly excluded. The point is one of difficulty; but I think that an alternative does not become unreasonable merely from claims for negligence receiving some limitation.

1 (*b*). Can claims in respect of injury or loss resulting from wilful misconduct be similarly limited? The condition here prescribes what amounts to a compulsory notice of action to be given within three or seven days; and Mr. Gordon for the defendants contended that a condition might be lawfully made prohibiting actions after a year or any other reasonable time, irrespective of ths Statute of Limitations. Wilful misconduct has always been treated as governed by different principles from mere negligence. In *Ronan's Case* (8), Morris, C.J., and Harrison, J., held that, even when there was a reasonable alternative, a signed special contract absolving from wilful misconduct would be invalid. It is said that the Company ought to have notice in order to make inquiries, and if necessary to dismiss incompetent or dishonest servants; but from the customer's point of view why should the Company (which as a corporation can only act through its servants) be allowed to cut down responsibility for misfeasance? Misfeasance differs widely from pure negligence: *Garnett* v. *Willan* (9);

(1) 10 H. L. Cas. at p. 567.
(2) 8 L. R. Ir. 81.
(3) 19 Q. B. D. 64.
(4) [1894] 1 Q. B. at p. 383.
(5) 10 H. L. Cas. at p. 576.
(6) 10 H. L. Cas. at p. 549.
(7) 3 H. & C. 337.
(8) 14 L. R. Ir. 157.
(9) 5 B. & Ald. at pp. 60, 61.

Steat v. *Fagg* (1); *Mallet's Case* (2). No doubt there may be a misfeasance which is hardly distinguishable from negligence. On the other hand, there may be highly culpable misfeasance amounting to a complete violation of the contract of carriage, as where goods are sent by a wrong route: *Mallet's Case* (2), or wilfully or recklessly delivered to a wrong person: *Hoare's Case* (3), or wilfully injured. The condition covers claims arising out of every kind of misconduct, and even extends to loss occasioned by fraud or dishonesty of servants (*per* Lord Westbury (4)), including cases where the default of the Company in supervision or otherwise conduces to the result: *Shaw's Case* (5). In *Curran's Case* (6) two pigs mysteriously disappeared, and no explanation was vouchsafed. At Christmas time turkeys might be stopped in *transitu*, or a cask of spirits might be tapped by railway servants—a matter which could hardly be ascertained at once on delivery. Could a Company protect itself from liability in such case by any time condition? How can they obtain by a condition immunity for a loss which amounts to trover, as in case of wilful misdelivery?

I am not satisfied that an alternative, imposing an absolute time limit for claims for loss or injury by misfeasance, can be supported as just and reasonable.

1 (*c*). In *Moore's Case* (7) Lord Fitzgerald threw out a suggestion that a condition limiting the time for a notice or claim after delivery would not be within the prohibition of section 7, and that such condition might be free from the restriction of reasonableness. I cannot accept this view. A new contract for good consideration to forego a claim, whether altogether or on terms, might be valid; but where the contract of carriage is entire with one consideration, any provision in such contract restricting statutory liability is inoperative if it be not reasonable. Serjeant Dodd more plausibly contends that the circumstance that the condition relates to something to be done after delivery, so far from enlarging the power of contract, excludes the application of the provision as to reasonable conditions, as such proviso is restricted to conditions

(1) 5 B. & Ald. 342.
(2) [1899] 1 Q. B. 309.
(3) 25 W. R. 631.
(4) 10 H. L. Cas. at p. 567.
(5) [1894] 1 Q. B. 373.
(6) [1896] 2 I. R. 183.
(7) 10 L. R. Ir. 95.

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with respect to delivery. In substance, however, the condition does relate to delivery, for it means that goods are to be accepted as rightly delivered unless a claim is made within the prescribed time. Serjeant Dodd's argument receives no support from any of the authorities, and I must reject it.

2. The next objection to the condition is that it is intrinsically unreasonable, because it applies even though (*a*) the injury is latent and could not be discovered by reasonable diligence, (*b*) and though the injury was known to the Company, and might be unknown to the owner, and (*c*) because it requires a written claim to be made. This last point I at once put aside. A written notice is a reasonable requirement to avoid the dangers of oral testimony; and a claim need not state any sum of money. The other objections are more serious. I am unable to say that there might not be latent injuries to live stock which could not be detected within three days. Heifers in calf (which are sometimes sent to and from England) might be peculiarly subject to such injuries. No doubt the present consignment did not include animals of this class, but why should not the condition be limited to injuries which could be discovered on delivery to the consignee? Again, where the injuries or loss (as in *Curran's Case* (1)) are as well known to the Company as to the owner, it is not easy to see why the Company should protect itself against such admitted injuries or loss by the technical plea that no written claim was served. In some cases the injury or loss might be known to the Company yet not to the owner, as where the owner accompanying his stock was killed or severely hurt in a collision. To be valid I think the condition should be differently framed. It is conceded that reasonableness must be determined as at the date of the contract, and without regard to the event: *Sheridan's Case* (2).

3. The last head of objection was founded on the insufficiency of the time allowed. The defendants contended that the condition was covered by *Lewis' Case* (3). That decision was given in 1860, three years before *Peek's Case* (4) in the House of Lords settled the law. The authorities before *Peek's Case* (4) are in confusion, as

(1) [1896] 2 I. R. 183.
(2) 24 L. R. Ir. 146.
(3) 5 H. & N. 867.
(4) 10 H. L. Cas. 473.

Willes, J., remarked, and subject to considerable discount. Thus, in *Ashendon's Case* (1) the decision by the Exchequer Chamber in *Harrison's Case* (2) was disregarded as inconsistent with *Peek's Case* (3) (see also *Dickson's Case* (4)); and I find it hard to reconcile the reasoning in *Cutler's Case* (5) with the decision of the Court in *Lewis' Case* (6) on the sixth plea. The Judges in *Lewis' Case* (6) held views as to conditions which *Peek's Case* (3) has shown to be erroneous. Pollock, C.B., in *Peek's Case* (3) gave an opinion which the Law Lords rejected. Channell, B., was a member of the Exchequer Chamber in the overruled judgment in *Harrison's Case* (2), and Lord Bramwell was never weary of protesting against *Peek's Case* (3). Even, however, if *Lewis' Case* (6) was to be accepted as binding, it is obviously distinguishable. It went on a special plea excluding wilful misconduct; the period there was seven days (the goods having been lost); the goods were not live stock; the loss took place on a short journey on one railway, and there was no question of cross-channel traffic. The sufficiency of the three day limit was questioned by Cockburn, C.J., in *Garton's Case* (7). Conditions in an ordinary contract were also supposed to be severable. An alternative is entire, and if any part is unreasonable the whole is bad.

The onus lies on the Company, and they have not convinced me that in case of traffic of the type we have before us the condition as to time is reasonable in the alternative offered. Sufficient opportunity for communication between consignor and consignee should be allowed before a written claim is sent in, and the possibility of latent injury should not be disregarded. In case of loss from theft or misdelivery the time allowance ought to be liberal.

II. As to the effect of the 9th condition in column B.; usually in sea carriage a warranty of fitness and seaworthiness is implied: *Steel's Case* (8); *Gilroy's Case* (9); and the words of the condition as to owner's neglect, may refer to such neglect in employing an unfit master or crew, as Brett, L.J., discusses in *Chartered*

(1) 5 Ex. D. 190.
(2) 2 B. & S. 122.
(3) 10 H. L. Cas. 473.
(4) 18 Q. B. D. 176.
(5) 19 Q. B. D. 64.
(6) 5 H. & N. 867.
(7) 1 B. & S. at p. 146.
(8) 3 A. C. 72.
(9) [1893] A. C. 56.

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Mercantile Bank of India v. *Netherlands India S. N. Co.* (1). The words, however, are wide, and it is said that there is no evidence of the accident having been caused by unfitness any more than by negligence. As I think that the alternative offered was unreasonable, it is unnecessary to decide the point.

III. If the plaintiff's position was such as to enable him to sue, there was at least a jury question whether the sale by the defendants was not a wrongful conversion. I adhere to the opinion I expressed in *Hughes's Case* (2).

IV. The jury have found that Coyle was owner of the cattle; the plaintiff suggests that there was some mistake as to this, but I must act on the Judge's report. Having regard to this finding, can the plaintiff sue for wrongful conversion?

Speaking generally, as between seller and purchaser, where goods have been consigned to a carrier, the right of action against the carrier goes with the ownership of the goods; the carrier cannot, from the mere fact that there is a consignor and a consignee, say to which he is liable: *Wilbraham* v. *Snow* (3); *Coggs* v. *Barnard* (4). The question of liability depends on employment and agency. The proper person to sue the carrier is the person who employs him. Ownership of the goods consigned is evidence that the carrier is employed by such owner, and where the consignee is owner the consignor is *prima facie* taken to employ the carrier as his agent. The mere advance of freight by the consignor is not sufficient to displace such inference. When, however, the consignor has a special property in the goods consigned, and is bound at his own risk to deliver such goods to the consignee, the employment of the carrier is attributed to the consignor, who can sue him. The question who has employed the carrier, whether consignor or consignee, is one of fact, and ownership of the goods, though important, is not decisive: *Bagge's Case* (5).

In the present case, the usual inference arising from ownership is sought to be displaced on the following grounds: there was a special contract between plaintiff and defendants, signed on behalf

(1) 10 Q. B. D. at p. 532.
(2) 26 L. R. Ir. 165.
(3) 2 Wms. Saund. 121.
(4) 1 Sm. L. C. 10th ed., 221.
(5) 15 Q. B. D. 625.

of the plaintiff; the freight note incorporated with the signed contract expressly states the plaintiff to be owner; the plaintiff, acting for an undisclosed principal, can, in accordance with the ordinary law of agency, sue on a contract made with defendants in his own name, unless and until the principal intervenes; the principal's claims have been satisfied, and the plaintiff has the plenary property now vested in him. The point is one of difficulty; but my present impression would be rather adverse to the plaintiff's right to maintain trover in respect of the dead animals. This, however, is a trifling matter, and hardly engaged any attention during the argument.

V. Can the plaintiff, if not owner, sue in contract? The denial of ownership in the defence is confined to the claim for trover and detinue. It is not extended to the contract counts, nor is there any denial of contract with the plaintiff. Under our pleading rules every allegation not specifically denied is taken to be admitted. At the trial the question of ownership was relied upon (as in the pleading) only in reference to trover and detinue. Among the elaborate requisitions put forward by the defendants there was no requisition for a direction based on the absence of contract with the plaintiff; and the Judge directed a verdict for the defendants, not on the ground that the plaintiff had no contract, but on the ground that he was precluded by the conditions in his contract from suing. The trover and detinue paragraphs were of small importance; the plaintiff's counsel might treat them as going upon special technical considerations peculiar to that species of action; but if the defendants had intended to dispute the plaintiff's right to maintain an action of contract, such defence should have been distinctly pleaded, to enable plaintiff's counsel to consider the situation, and if necessary adduce detailed evidence as to the dealings and relations between plaintiff and Coyle.

In a case of a different character, the Court might allow an amendment; but here it would seem to be contrary to the course of the trial as well as to the real merits if we were by amendment to allow the action to go off upon a side issue. The case was tried out on the issue as to the validity of the conditions—nine tenths of

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ownership in the stock is now at least vested in the plaintiff, so that the defendants cannot be harassed by a second action; and we ought not to allow the cost of an expensive litigation to be wasted or thrown on the plaintiff if he is in the right upon the questions he came to try. In any case, if an amendment were allowed, it should only be upon the terms that defendants should get no costs up to the date of such amendment.

LORD O'BRIEN, L. C. J.:—

I agree in some respects with my brother Wright, and in some respects with my brother Gibson, and I agree in every respect with my brother Madden, who tried the case. In my opinion, the condition relied on as a defence is just and reasonable. Upon the question as to whether Murphy was the proper person to bring the action, I entirely concur in the judgment of my brother Wright. We are unanimous in holding that the counts in trover and detinue cannot be maintained, inasmuch as the plaintiff was not the owner of the cattle, nor was he in possession of them. With respect to the claim founded on contract, I think that we should deal with the case as if the amendment suggested by my brother Wright had been made. Bowen, L.J., in *Cropper* v. *Smith* (1) says: "Now I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other Division of the Court of Appeal, and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct if it can be done without injustice to the other party." These observations were quoted with approval by Holmes, L.J., in *Fisher* v. *Nation Newspaper Company* (2), and he expressed his opinion that if an amendment had been necessary in that case, the Court ought either to make it or deal with the case as if it had been made. Lord Esher, some years after the Judicature Act had been passed

(1) 26 Ch. D. at p. 710. (2) [1901] 2 I. R. at p. 485.

in England, said he would deal with every case in which an amendment ought to be made as if it were actually made.

I now proceed to deal with the principal question in this case, viz.: whether No. 2 of the conditions under the heading A. is a just and reasonable one.

It was argued that no condition, however apparently just and reasonable, which in any way had the effect of relieving a Railway Company from negligence, could be valid. The 7th section of the Railway and Canal Traffic Act was referred to, which in its earlier part enacted that every notice excusing the Company from responsibility for negligence in receiving, forwarding, or carrying goods was null and void; but this part of the section is subject to the provision which immediately follows, which commences: "Provided always that nothing herein contained," that is to say, notwithstanding anything that has gone before, it shall be lawful to make such special contracts as shall be adjudged by the Court or Judge to be reasonable. This is quite plain from the Act of Parliament. Lord Wensleydale in his judgment in *Peek's Case* (1), when dealing with the 7th section of the Railway and Canal Traffic Act, leaves no doubt about it. He says: "I have considered these terms fully, and I have satisfied myself that the Legislature meant to allow carriers to limit their responsibility by reasonable conditions, but that a Judge in an ordinary trial, or possibly the Court on a trial at bar, should determine whether those conditions were reasonable or not, subject to the control of the Court above. The provision that the Company may make conditions, if thought reasonable by the Judge or Court, comes by way of qualification of the general prohibition exempting Companies from losses arising from their own neglect or default, or that of their servants. It means that, notwithstanding that general prohibition, they may make a fair bargain for their remuneration, such bargain being sanctioned by the Judge or Court. When the peculiar condition is sanctioned by the Judge, and the Court in case of appeal, as reasonable, the previous prohibition is done away with."

Upon this first question then there is no doubt, and as to this

(1) 10 H. L. Cas. at pp. 575, 576.

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we all agree. I now turn to the question in respect of which there is a difference of opinion. That question is whether the condition which has been so much impugned is reasonable or not. Let me read it:—"No claim in respect of *live stock* for loss, injury, or delay for which the Company may be liable will be allowed unless the same be made in writing in the case of injury or delay within three days after delivery of the live stock in respect of which the claim is made, such delivery to be considered complete at the termination of the transit; or, in the case of loss, within seven days after the time when the live stock should have been in the ordinary course delivered."

This is the impugned condition. With reference to the apprehensions expressed by my brother Gibson in the judgment he has just delivered, that the condition in question may establish immunity in the case of pilfering by railway servants of Christmas presents, such as turkeys killed and dressed for food, spirituous liquors, and cakes, I think it well to point out that the impugned condition is conversant exclusively with live stock, a subject-matter the condition of which attracts the eye; for the eye, if there is any reasonable intelligence and experience behind it, can readily gauge the condition of a maimed or injured cow or horse. A maimed or injured condition immediately arrests the attention of any person that has any reasonable acquaintance with either a cow or a horse. The animal that is maimed limps or yields, or refuses to move, or makes some outward sign if the injury is internal, and the observation that was made with reference to the validity of the condition in *Simons' Case* (1) by one of the Judges during the argument of the case of *Garton* v. *Bristol and Exeter Railway Company* (2) had reference to some such inanimate thing as a personal ornament in a case or bag that could not by movement attract the eye, but the condition would be ascertained only by opening the case or bag and examining the contents. We must not leave out of sight the case of *Shaw* v. *Great Western Railway Company* (3), where Wright and Lawrance, JJ., held that a Railway Company could by a condition which would be unreasonable within section 7 of

(1) 26 L. J., C. P. 25; 18 C. B. 805.
(2) 1 B. & S. at p. 146. (3) [1894] 1 Q. B. 373.

the Railway and Canal Traffic Act protect themselves against the theft of their servants where the theft was unconnected with negligence. I must say that that case went further than I was myself prepared to go.

But I return to the condition. What does it provide? Not that the Company are not to be responsible for negligence. This clearly is not the effect of the condition. It simply provides that no claim shall be good for damage to live stock unless made within three days after delivery, nor for loss unless made within seven days after the time when they should be delivered. The condition imposes a limitation of time within which a claim should be made.

The question is, is the time limit a reasonable one? Is it reasonable by cattle dealers and the Company, by senders, owners, and carriers?

In the determination of any question of reasonableness I assume that I may postulate that there should be reasonable diligence on the part of the consignor and consignee, and that they or their representatives or servants should be reasonably competent to deal with any subject-matter entrusted to them. Before I test the condition by suppositious instances I think it is only fair to assume that the person who buys cattle in Ireland and sends them to the owner in England should send from Ireland at a time that will reach the consignee, either before the arrival of the live stock or simultaneously with their arrival, a short note or telegram giving the number of the cattle and their respective prices or value, and stating whether any of them are maimed or injured or not. I give an instance. A communication might be made in this way: "I send you by train twenty head of cattle—bullocks—all sound, price, £12 a-piece," or whatever the price may be. This, as I have said, may be done by letter or by telegram. A short adequate description could be easily given by telegraph; in fact, I believe the telegraph is the usual mode of communication in such cases. This communication ought to reach the consignee, or his representative who is to take delivery of the stock, before or similtaneously with their arrival. I postulate also that the consignee should be, or his representative should be, a person who knew something about stock. It was suggested by the

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plaintiff that he might be some ragged boy whose only faculty in relation to cattle was the power to make some inarticulate noise in hurrying them forward. This, I think, is eminently unreasonable. There should be someone at the railway station who knew something about beasts, and at least could detect whether they were lame or had sustained injuries or had the appearance of having sustained injuries. In the vast dimensions of the cattle trade it is only reasonable that he who takes delivery of the cattle should be a person of ordinary intelligence, and not wholly unacquainted with live stock and of the taking delivery of them. The Railway Company must have reasonable protection as well as the cattle dealer. Now then, premising that there should be reasonable diligence and reasonable competence on both sides, let me take an instance and by its application test the condition in question. I am very careful to deal with the case as one of cross-Channel traffic, and I assume for the purposes of the argument that the day of arrival—the first day—counts in the limitation of time as against the Company, though in my opinion it does not count as against the Company; I think the first day is excluded in the computation of time. The cattle arrive from Ireland at their destination in England, say, on Tuesday morning. Well, a fairly competent man equipped with a note or telegram from the sender receives them. He is diligent and fairly competent to do his work. This work is not merely to drive cattle from the train, but to examine them to see how they are. He sees how they leave the railway premises, and he has an entire day to examine them. He can examine them as they leave the railway premises, as they go along the road to their destination, and when they arrive at their destination. From the time he receives them in the morning he has a whole day, the whole of Tuesday, to examine the cattle. He has not only the whole of the first day, but he has the greater part of the second day, Wednesday; and if there is anything wrong he can write that evening to the office of the Railway Company in Dublin making his claim, and if he avails himself of all modern facilities, as I think he ought, he can telegraph in the afternoon on Thursday making the claim. That is to say, he would have the whole of Tuesday and Wednesday and the greater part of Thursday to examine the cattle and to make his claim;

and it would take a great deal, indeed, to persuade me that a cattle dealer or his representative had not under these conditions an adequate opportunity of examining the cattle and making the necessary claim. The same *mutatis mutandis* applies to horses, even *a fortiori*, as to horses. If a horse has sustained an appreciable injury in steamboat or railway train, and if a horse dealer or horse dealer's servant or groom cannot—in ten or twelve hours—find out what is wrong with him, he is not fit to be a horse dealer or horse dealer's servant or groom.

I think I am justified in postulating that there should be some degree of intelligence and some acquaintance with horses on the part of the person who takes delivery of them. It is really hard to say which are the more acute class—horse dealers or cattle dealers. I have seen a great deal of both, and yet my mind is completely open. I am far from disparaging them. The nature of their business sharpens their intelligence. Most cattle dealers and horse dealers can judge of the condition of a cow or horse respectively as well as a veterinary surgeon; for my own part, from what I have seen of them, and I have seen a great deal of horse dealers, I would prefer the opinion of a horse dealer as to the condition of a horse to that of the average veterinary surgeon, provided, of course, the opinion was honestly given. If the consignee is a horse dealer or cattle dealer, he is eminently qualified to see whether there is anything wrong with cow or horse in a few hours, not to say substantially two days; and if the consignee is not on the spot to receive the animals, he should send someone to do so who has some degree of intelligence and ordinary acquaintance with the animal he is receiving. I put everything I have been now saying to counsel for the plaintiff during the argument; and it was replied that there may be some latent injury; that, for instance, the horse or the cow may be suffering from shock; and that, though apparently quite well to the critical eye of the horse dealer or cattle dealer or their respective representatives, the injury may be there though unseen. But I ask how long are we to wait for the outward manifestations, for some outward sign of the internal injury? Are we to wait until all recollection of the particular horse or particular cow has passed out of the recollection of the servants of the company? When, owing to the vast

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dimensions of the cattle trade or of the horse trade, it may be impossible to identify the particular horse, and a dishonest consignee may have it all his own way as to the story he tells, and there may be no way of checking him.

In justice to Railway Companies we should remember the dimensions of the cattle and horse trade, and, while we secure for the cattle dealer and horse dealer an adequate opportunity of seeing whether their animals have been injured and of making a claim with reference to them, we should also see that the Companies should have a fair opportunity of investigation ; that a claim is not to be postponed until the proper means of investigation may be lost and the Companies may not be in a position, having no adequate knowledge of the circumstances under which a particular claim was made, either to admit it, to settle or compromise it, or entirely repudiate it. Promptness in making the claim will secure all this, and enable the Company adequately to examine the conduct and action of their employees and to dismiss them if found to be negligent. For this purpose a limitation of time within which claims may be made is all important ; it prevents dilatoriness and dishonesty on the part of claimants for injury or loss, and it makes railway systems efficient ; it checks and controls dishonest servants and secures justice all round. A time limit, as I said, is all important. It is absolutely necessary to secure all this, and if we are to wait for the manifestations of latent shock in a cow or horse, we subordinate what is fair and reasonable as regards the general traffic to very exceptional, indeed I may say fantastic, considerations—and we open the door to all sorts of dishonest claims.

It has been said that a cow, from injuries received on the voyage may sling her calf, and that event may not occur within the three days ; no doubt this is possible, but how long are we to wait for the event? If a cow receives an injury she may sling her calf at once, say within a day or two, in which case there would be ample time to make a claim ; or, on the other hand, it may be months before she slings it. Are we to wait for the lapse of months, when it is no longer possible for the railway officials to investigate the case, when they are at the mercy of the cattle dealer or his representative? It must be remembered, however,

that cross-Channel traffic, so far as relates to live stock, is practically confined to dry stock—to horses intended for the army, or hunting, or vehicular traffic, and to cattle which are exported for human food. My brother Gibson, with a view to illustrating the nature and extent of the traffic between Ireland and England, referred to a learned acquaintance of his who sent to England a cow in calf. Well, I know who the acquaintance is. He is a distinguished Shakspearean scholar—he has adorned our literature by a delightful book on the immortal bard of Avon, but I am very confidently of opinion that his farming operations will never make any serious impression on cross-Channel traffic; and it is not to be forgotten that when my learned brother's "learned acquaintance" came at the trial to deal with this impugned condition he held, after citation of authority and argument, that it was a reasonable one.

I think, however, what was pressed most against the reasonableness of this condition was that, having regard to the limitation of time contained in it, in case of injury there would be no opportunity of communication with the sender of the cattle in Ireland, and that there should be time allowed also for consultation with a solicitor with a view to get him to formulate a claim. This affords, in my judgment, no substantial ground of impeachment of the condition. Even though there might be time to wire or write to the Connaught dealer to enable him to make a claim in Ireland in reference to loss, delay, or injury, still, I think, if a communication with Ireland were held to be essential it would be as well to have no limitation of time at all. Why? Because the Connaught cattle dealer is constantly moving about from one fair to another, and if a letter or telegram were to be kept circulating after an ambulatory cattle dealer until it reached him, why many weeks might be necessary for the operation. A cattle dealer is one day in Connaught, the next day in Munster; one day at the fair of Swinford, in Connaught, next day at the fair of Clonroad or some other fair in Clare. He is much oftener abroad than at home. No one knows where he lodges. He does not know himself where he will lodge until he gets into a town. Postmen and telegraph boys, outside the neighbourhood of his home, could not identify him, and if it were necessary to formulate a condition on

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the basis of its being essential to communicate with him, it would render any condition of the kind absolutely useless. Promptness of claim, in the interests not only of the Companies but of justice, is absolutely essential; the cattle traffic is of vast dimensions, and if the thing is allowed to stand over for any very considerable time, so far as the Company is concerned, all trace of it is likely to disappear, and no means will exist of checking what is false or exaggerated, of ascertaining if an injury exists, when and where it was sustained—whether during the voyage and journey from Ireland—whether after delivery in England to the drovers there—whether in some place, or on some journey in respect of which the Irish Railway Company has no responsibility—whether it was caused by the cruel treatment or neglect of the drovers, or by some circumstance with which the Irish Railway Company has no connexion whatever.

As to providing time not only for discovery of the ambulatory cattle dealer, but for his instructing a solicitor to formulate a claim in writing, this seems to be so unreasonable as not to require to be dealt with. An informal claim by letter, notice, or telegram is quite sufficient. It is very essential that the *litera scripta* should exist with a view to ascertaining what the claim is, and to prevent prevarication. But why communicate with Ireland at all for information to base a claim? The *factum* of the injury, delay, damage, or loss is disclosed at the end of the journey. Now as to delay, there is no difficulty at all; the consignee or his representative has only to look at the clock; and as to the number and condition of the stock, it is only reasonable that there should be in the consignee's hands, before or at the time of the arrival of the stock, a letter by post or a telegram by wire, stating in one or two sentences the number and condition and price and value of the animals. It appears to me eminently unreasonable that the consignee should not have an adequate description of his stock at the time of arrival, but that a Railway Company should be subjected to the dilatory process of having a request for information circulating through Ireland after an ambulatory horse or cattle dealer. When the Irish cattle dealer was found, and the Irish cattle dealer had found an attorney to formulate a claim, all means of identifying the particular cattle and investigating the circum-

stances of some accident or negligence or misfeasance would most likely, in the vast amplitude of the cattle trade, be lost.

I have up to the present dealt with the impugned condition, so far at least as related to the imposition of a time limit within which a claim should be made, without reference to decided cases. Irrespective of decided cases dealing with the question which as a member of the Court I have authority to deal with, namely, whether the condition is just and reasonable, I am of opinion it is just and reasonable. I have dealt with the condition also as applying not merely to inland traffic but to cross-Channel traffic on the basis that the day of arrival of the stock was (though I am of opinion it was not) included in the computation of time; and on the basis also that the Company which delivered the cattle or live stock in England were agents for the Company merely to carry and deliver the goods, and not to receive notices with reference to their loss, damage, delay, or injury. I must say I am not altogether satisfied that the Company which delivers stock or goods is not also a proper Company to receive notices of complaint with reference to the stock and goods they deliver. The *factum* of the injury, delay, or loss is ascertained at the end of the journey. However, that was not argued, and I have assumed that all notices should be sent to Dublin to the principal office of the defendants there.

I now turn to a consideration of some of the cases. It is clear that a condition which wholly exempts a Company from negligence is bad. At one time such a condition was considered valid, and because it was held to be valid in the case of *Carr* v. *Lancashire and Yorkshire Railway Company* (1), the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31 was passed: see observations of Lord Blackburn and Chief Justice Cockburn in their judgments before the Peers in *Peek's Case* (2). Chief Justice Cockburn is reported at p. 558 of the report in *Peek's Case* (2) to have said: "In a very short time after the decision of *Carr* v. *Lancashire and Yorkshire Railway Company* (1) was pronounced the Act of Parliament was passed upon which the present question arises. It cannot be doubted that the object of the Legislature in passing it was to prevent

(1) 7 Ex. 707. (2) 10 H. L. Cas. 473.

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these contracts in which *liability for negligence is either entirely excluded* or made conditional on the payment of a premium." I emphasize the words "*entirely excluded.*" And on the next page, 559, the Chief Justice is stated to have used the words "absolute and unqualified freedom from all liability in respect of negligence." Now, the conditions which we are dealing with provides no such immunity from negligence. It simply provides a time limit within which claims are to be made, and if the opinions of Lord Fitz Gerald and Lord Justice Barry, clearly expressed when Judges of the Queen's Bench, is well founded, there is nothing in the Railway and Canal Traffic Act to invalidate such a condition: see *Moore's Case* (1), where Lord Fitz Gerald is reported to have said: "And, further, we desire to point out that the conditions which the Court or Judge is to determine to be just and reasonable under the statute are with respect to the receiving, forwarding, and delivering of animals, goods, or things." "The 8th condition," he added, "relates to something to occur after delivery."

I now come to the case of *Lewis* v. *The Great Western Railway Company* (2). This case is referred to in the text-books as a binding authority: see, amongst others, Hodges on Railways, 7th ed., p. 569. The claim there was for the loss of a bag of clothes, and the condition relied on by the defendants was that no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods; nor for loss unless made within seven days of the time they should have been delivered. No doubt the part of the condition availed of in that case was the seven-day provision as to loss; but Pollock, B., deals with both branches of the condition as set out in the fifth plea, and approves of it. He says: "I think the *conditions* relied on in the *fifth* plea are perfectly reasonable. It was argued that *their* operation is to introduce into these contracts a sort of Statute of Limitations. There is no Statute of Limitations applicable to crimes, but there are many charges which, if not brought forward at once, no Judge would allow to be entertained. The Company, wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are de-

(1) 10 L. R. Ir. 95. (2) 5 H. & N. 867.

livered they shall be promptly examined, and complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort." Channell, B., said: "I entertain a strong opinion that the condition set out in the *fifth* plea is reasonable." Bramwell, B., says: "As to the first, I think seven days ample time for sending in a claim of such a nature as that in this action, and, if not, the party should have objected at the time when the contract was made."

Now I have dealt at length with the condition, so far as it related to injury, damage, or delay, and I think everything I said as to injury or delay, to which the three-day limit applied, was *a multo fortiori* applicable to the case of loss to which the seven-day limit applied. If the stock was not delivered five or six days after the time specified for delivery, the consignee or his representative ought to conclude there was a loss, and send forward a claim. Under whatever head this case is to be dealt with, whether injury, delay, or loss, I am of opinion the second condition affords a good ground of defence. But I desire to revert to what both Pollock and Bramwell, BB., said. The former said that "the law allows persons to make their own bargains in matters such as this"; and the latter said, if the time mentioned was not sufficient, "the party should have objected at the time when the contract was made." No doubt this was said before *Peek's Case* (1) was decided; but I would refer to what Lord Fitz Gerald said long after the decision in that case. Dealing with the case of *Lewis* v. *The Great Western Railway Company* (2), he said: "I was much struck by the judgment of Bramwell, L.J., and would be inclined, if necessary, to adopt its broad common sense, and, applying some of his observations to the present case, I should say the most cogent evidence that the whole contract was fair and reasonable is afforded by the fact that the plaintiff accepted and signed it" (3).

As to difference as to distance that existed in *Lewis' Case* (4), I think that made no appreciable distinction; about the length of a day would be required in either case for communication by letter; and if communication was by wire, as I think it ought,

(1) 10 H. L. Cas. 473.
(2) 3 Q. B. D. 195.
(3) 10 L. R. Ir. 107.
(4) 5 H. & N. 867.

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there would be really no difference whatever. As to *M'Carthy's Case* (1), where it was intimated that a condition which absolved from liability if cattle could walk from a ship to a quay would be bad, this, I very humbly say, was quite right, because it was a mockery to suggest that there could be any satisfactory examination in the crowded and short passage of cattle from a ship. Very different is the case where, if you make the claim in writing, and it must be sent to the Dublin office, you have a clear day and a-half to make the examination; and if you can make the complaint by telegram, and I am clearly of opinion that a telegraphic communication would be quite adequate, there would be at least two days and a-half to examine the stock and make the complaint. In my view I am, indeed, very strongly of opinion that one clear day to examine the stock would be quite time enough, ample time, to do so. I shall not take a summer's day, when you would have from five in the morning to nine at night to examine the stock; but take a winter's day, when you would have from, say, eight in the morning to four in the afternoon to examine them. To allow further time to be given by this condition, in my opinion, would be to allow a premium to dilatoriness and incompetence, and would be unjust and unreasonable to the Railway Company.

The following order was made:—

> "IT is ordered, on the application of counsel for the defendants, that the defendants' defence in this action be treated as amended at the trial, for the purpose of raising the questions of 'no contract' and of the 'property in the goods.' And it is further ordered that the plaintiff's motion be, and the same is hereby, refused; that the plaintiff and the defendants do abide his and their own costs of this motion; and that the judgment with costs entered for the defendants in this action before the Right Hon. Mr. Justice Madden do stand."

Solicitor for the plaintiff: *Samuel Abbott.*
Solicitors for the defendants: *Frederick Sutton & Son.*

J. G. T.

(1) 12 A.-C. 218.

SMITH *v.* WILSON (1).

(1900. No. 1195.)

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Feb. 10–13, 24.

Way—Public right of way—Obstruction—Right of action—Particular damage—Dedication—Dedication of substituted way—Dedication by limited owner (fee-farm grantee).

Between 1844 and 1850 the sub-lessee for a term of years of certain lands, over which there had been in existence prior to 1805 a public right of way, substituted therefor another way, with a bridge and path. In 1874 the sub-lessee surrendered his interest to his immediate landlord, who held under a fee-farm grant dating from 1857. The fee-farm grantee continued in occupation of the lands for two years, when he re-let them to the defendant. During the two years of his occupation the fee-farm grantee acquiesced in the public user of the substituted way, and at the trial the jury found that he had acquiesced in and adopted the dedication to the public of the right of way as so altered.

There was no evidence of dedication of or acquiescence in the substituted way by the owner in fee.

The plaintiff, a small farmer, had been using said way as a means of access from his farm to the public road leading to the market town, about four miles distant. The defendant obstructed the way by removing the bridge and erecting a fence. The plaintiff was thereby forced to take a longer and more circuitous route when going to the market town, which he required to do about once a-week, and was obliged on some occasions to pay for a car.

On new trial motion in an action for obstruction:—

Held, that it was competent to the grantee in a fee-farm grant to dedicate a public right of way, and that, under the circumstances of the case, the acquiescence of the fee-farm grantee in the act of his former tenant amounted to a dedication to the public of the substituted way, binding upon his interest, and all claiming under him, including the defendant.

Held, further (Kenny, J., dissenting), that the evidence was sufficient to sustain the finding of the jury, that the plaintiff had suffered particular damage beyond that which was common to the public at large, and that the verdict for damages found for the plaintiff by the jury at the trial could not be disturbed.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and KENNY, JJ.

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NEW TRIAL MOTION.

The action was tried before Mr. Justice Barton and a special jury at the Belfast Summer Assizes, 1901. It was brought by the plaintiff, a small farmer (and by two others who at an early stage discontinued their claims), to recover damages, £100, for the obstruction of a public footpath leading from his farm to the public highway by removing a bridge and erecting a fence and gate, and rendering the way impassable by foot passengers, the plaintiff alleging that by reason of this obstruction he and his servants were compelled to go by a longer route to his market town, and thereby valuable time and work of the plaintiff and his servants were consumed, and the plaintiff was prevented from employing his servants during such excess of time as he otherwise would have done. There was also a claim in respect of a private way, but as to this the learned Judge at the trial directed against the plaintiff. The defence was substantially a denial of the right of way, and a denial of the obstruction.

At the trial the following questions were submitted to the jury, and answered:—

1. Did the defendant obstruct the plaintiff in the use of the way marked A to E on plaintiff's map?—*Yes.*

2. Had a public right of way for foot passengers been dedicated by the owners of the soil from the point A to the point E on plaintiff's map, passing along the millrace from A to B, and through the premises marked mill premises from B to G and from G to H (*a*) prior to 1805?—*Yes.* (*b*) Prior to 1812?—*Yes.* (*c*) Prior to 1844?—*Yes.*

3. Was the bridge at B and the way from B to G along the wall of the mill premises substituted by Messrs. Davidson between 1844 and 1850 for the former portion of the public way through the mill premises from B to G?—*Yes.*

4. Did Mr. Justice Harrison acquiesce in and adopt the dedication of the public right of way so altered from A to E?—*Yes.*

5. Has the plaintiff suffered any damage beyond that which is common to the public at large?—*Yes.*

Thereupon the jury found for the plaintiff on the public right

of way with one shilling damages (1), and judgment was given for the plaintiff upon this count for one shilling damages and costs; and for the defendant on foot of the claim of a private way.

Counsel for the defendant now moved for an order that the verdict and judgment entered for the plaintiff Jeremiah Smith at the trial of the action be set aside, and judgment entered for the defendant with costs, on the ground that there was no evidence that the defendant was guilty of the wrongful acts complained of, and on the ground that on the evidence there was no person competent to dedicate or grant a public footpath over the lands mentioned in the statement of claim, and on the ground that there was no evidence that the said plaintiff suffered any special damage by reason of the alleged obstruction of the said footpath, and that the learned Judge should have so directed, or that a new trial of the action be ordered on the ground that the verdict of the jury was against evidence and the weight of evidence, and that the trial was unsatisfactory.

The facts were shortly these. The fee-simple of the entire of the lands over which the right of way was claimed was vested in Lord O'Neill, who demised one portion of it to Robert Harrison for lives renewable for ever in the year 1805, and another portion of it to the same lessee for lives renewable for ever in the year 1812. The lease of 1812 had been renewed from time to time and still subsisted; the lease of 1805 had been in 1857 converted into a fee-farm grant. In 1844 Robert Harrison sub-demised to A. and J. Davidson for a term of 40 years the portion of the land held by him under the lease of 1805; and, some time between 1844 and 1850, John Davidson, the tenant in possession under the sub-lease of 1844, built a wall across the then existing public right of way (which the jury found had been in existence prior to 1805), thereby closing it to carts and horses, and substituted for the use of foot passengers a bridge and footpath in lieu thereof. On the 2nd May, 1874, the Davidson sub-lease was surrendered to Mr. Justice Harrison (in whom Robert Harrison's interest had become vested), and he remained in occupation of the land until the 1st May, 1876, when he re-let it to the defendant.

(1) It was stated at the Bar that the plaintiff had consented at the trial to the damage being assessed at a nominal figure.

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The defendant, shortly before action brought, removed the bridge and built a wall across the path, thereby (as the jury found) obstructing the plaintiff's access from his farm to the public high road. Mr. Justice Harrison during the period of his occupation, 1874–1876, had not interfered with the public user of the bridge and footpath; and (as the jury found) had adopted and acquiesced in the dedication of the substituted way (*i.e.* the bridge and footpath) in the place of the public way in existence prior to 1844–50. The O'Neill estates were in settlement since 1841, so that no presumption could be relied upon as against the owner of the fee-simple of any dedication, binding against him, of a right of way in substitution for the way in existence prior to 1805; and the question for argument hereupon arising was substantially whether the acts of Davidson so acquiesced in by Mr. Justice Harrison (the grantee in the fee-farm grant of 1857) amounted in law to a dedication of the substituted way binding upon his interest and upon the defendant, who claimed under him.

In regard to the 5th finding of the jury—that the plaintiff had by reason of the obstruction suffered damage beyond that which was common to the public at large—the evidence given at the trial upon this point was as follows.

The plaintiff Jeremiah Smith stated:—

"Until the bridge was taken down I was always in the habit of using it, and used it constantly—sometimes twice or once a week. I mostly would be going to Ballymena. It is decidedly the best road from my house to Ballymena: better than the Ballygarvy road. I used it because it was a shorter and better way, and always used it walking till the bridge was broken down. Since that time I had to go round by Broughshane. I had to go half-a-mile or three-quarters of a-mile further round the corner of the Broughshane road. The Ballygarvey road is anything but a good road. I labour on my farm, and the extra bit of road would take me longer from my farm. Undoubtedly, I have had to pay for a seat on a car to go to Ballymena since the bridge was broken. . . . [Cross-examined:] I did not take a car so often (*i.e.* to go to Ballymena) before the bridge was taken down. The car runs along the Broughshane road. . . . [Re-examined:] I have been put to more expense by cars than before the bridge was put down."

Serjeant Dodd, *R. F. Harrison*, *K. C.*, and *M'Ilroy*, for the defendant.

Hume, K.C., and *Gordon, K.C.* (*R. F. Todd* with them), for the plaintiff.

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Cur. adv. vult.

Feb. 24.

KENNY, J.:—

This application on behalf the defendant to change the verdict into one for him is based on three grounds, which I shall subsequently examine separately. The action was brought by three plaintiffs in the month of January, 1900; but by notice of discontinuance, dated the 18th June, 1900, two of them disappeared. The cause of action was for wrongful obstruction of a footpath by the removal of a bridge, and the erection of a fence and gate; and the damage alleged to have been suffered by the plaintiff was very specifically alleged. It was claimed that the footpath was of great use and value for the convenient occupation and enjoyment of the plaintiff's lands, and that on divers occasions in the course of the management of the plaintiff's farm, he and his servants were, by reason of the obstruction, compelled to go by a longer route, and that thereby valuable time and work of the plaintiff and his servants were consumed, and the plaintiff was prevented from employing his servants during such excess of time as he otherwise would have done. The defences consisted of traverses. The action, for some reason, was not brought to trial until the month of July, 1901, over a year and a-half from the time when it was instituted. The case made by the defendant at the trial, and as to which we have heard a most exhaustive argument in this Court, was (1) that the alleged obstruction was not the work of the defendant; (2) that the alleged right of way being a public one, it was essential for a member of the public, suing individually in respect of the obstruction, to show that he had suffered an injury beyond and distinct from the general injury to the rest of the public, and that the plaintiff had failed to give any evidence of such injury; and (3) that there had been no dedication of the alleged right of way to the public. It would appear that the plaintiff was also relying alternatively on a private right of way, but, before the close of the plaintiff's case, Mr. Justice Barton directed against that right. In the argument before us there has been no controversy as to the propriety of that direction, and the case has to be dealt with as involving a public right of way only. The defendant went into

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evidence, and the jury, in reply to the questions put to them by the learned Judge, found—

(1). That the defendant had obstructed the plaintiff.

(2). That a public right of way for foot passengers had been dedicated by the owners of the soil from a point in the vicinity of the plaintiff's house through the defendant's premises on to the road leading from Broughshane to the town of Ballymena prior to the years 1805, 1812, and 1844.

(3). That between 1844 and 1850 the Messrs. Davidson, who were then lessees for a term of years, had substituted for portion of the way, so found to have existed prior to 1844, a bridge and another path.

(4). That Mr. Justice Harrison, Davidsons' landlord, who then held under a lease for lives renewable for ever, acquiesced in and adopted the dedication of the public right of way as so altered.

(5). That the plaintiff had suffered damage beyond what was common to the public at large.

On these answers the jury found for the plaintiff with 1*s.* damages.

I shall now deal with the three points upon which the defendant rests his case. On two of these points, namely, as to the act of obstruction and as to the dedication of the highway, there is, I think, no difference of opinion between the other members of the Court and myself; but with reference to the question of particular damage alleged to have been suffered by the plaintiff, I have the misfortune to hold an opinion as to the evidence submitted to the jury upon that issue at variance with that held by my brethren.

Inasmuch as the decision in favour of the defendant on any one of the three points that have been argued would mean success for him upon the present application, I propose to deal, in the first instance, with this question of "particular damage." The principle by which the Court is to be guided admits of no doubt, but the difficulty occurs in its application. It is quite settled law that in the case of an obstruction to a public way, or in the case of a public nuisance, the Attorney-General is the proper person to take proceedings for its abatement in the interests of the public at large

who are affected by its continuance, and the reason for the rule is, that a contrary one might have the effect of putting each member of the public to a separate action and causing multiplicity of suits. Furthermore, it is settled that no member of the general public can maintain such an action unless he has suffered an injury other than and beyond that which the community in general have suffered. In other words, he must have, in addition to the injury or inconvenience that is common to all, a particular grievance of his own; and in the observations I am about to make I shall refer to the additional injury as "particular damage."

The cases on the application of the rule are very numerous, and the earlier ones down to the year 1867 will be found to be very fully reviewed in *Winterbottom* v. *Lord Derby* (1); *Beckett* v. *Midland Railway* (2); *Benjamin* v. *Storr* (3); *Fritz* v. *Hobson* (4). The "particular damage" may arise from injury to property by reason of the access to it being interfered with, and its selling or letting value being depreciated. Or there may be particular damage of a personal character, when a direct injury is suffered, or a man's trade or goodwill has suffered. In these cases a particular damage, differing in *kind* from that sustained by the community in general, is suffered. But, notwithstanding some observations of Lord Chelmsford and Lord Cranworth, in *Ricket* v. *The Metropolitan Railway Co.* (5), it seems to me that the rule cannot in its application be limited to such cases. Lord Penzance, in *The Metropolitan Railway Co.* v. *M'Carthy* (6), points out that the words of the rule are wide enough to include cases of damage not only differing in *kind*, but also differing in *degree*; and I would gather that his opinion was in favour of the inclusion of the latter. In the present case we have not to consider any question of damage differing in *kind*, unless it could be contended that the damage caused by the inconvenience sustained by a large section of the community residing in a particular direction may be regarded as differing in kind from that sustained by another section whose avocations or pleasure do not necessitate so frequent a use of the way in dispute. No such argument was presented to

(1) L. R. 2 Ex. 316.
(2) L. R. 3 C. P. 82.
(3) L. R. 9 C. P. 400.
(4) 14 Ch. D. 542.
(5) L. R. 2 H. L. 175.
(6) L. R. 7 H. L. 243, at p. 263.

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us. We were simply asked to say that there was evidence which the jury were justified in acting on of an injury greater in degree than that suffered by other members of the public. If we supported the verdict in the absence of such evidence, it seems to me that we would be failing to recognise the existence of any rule as to the necessity for particular damage.

The plaintiff's case is, in my opinion, based on inconvenience alone, unattended by any substantial damage. If a money value were placed on the injury arising from that inconvenience, I think that the case could not be withdrawn from the jury. I would go further, and, following *Boyd* v. *The Great Northern Railway* (1), say that, if the fair inference from the evidence was that in the particular case valuable time was lost by reason of the obstruction, and that time meant money, there was a solid foundation for the action. The facts which the jury had to consider in this case, and on which they based their verdict with 1*s.* damages, were these. The plaintiff describes himself as a farmer, his holding consisting of four or five acres, which he "labours." His associated plaintiffs were another small farmer and a labouring man. His pleader made a most admirable case of "particular damage" for him in the statement of claim, for he appropriated the allegation of damage that appears in *Blagrove* v. *The Bristol Waterworks Co.* (2), and which, on demurrer, was held to be a good paper statement of particular damage—sufficient, if proved, to maintain the action. The allegation is that the defendant and his servants having to use a more circuitous route to the town of Ballymena, their valuable time has been consumed, and the plaintiff has been prevented from employing his servants during such excess of time as he otherwise would have done. Before the alleged obstruction the plaintiff had three roads by which he might get to Ballymena, which was some *four* miles distant from his cottage. There were two high roads, called the Ballygarvey road and the Broughshane road, each of which was accessible for horses and carts. The third was the footpath in question, the exit of which was on the Broughshane road, and by the using of which an angle was taken off the latter route, and, for foot passengers, about half a mile to

(1) [1895] 2 Ir. R. 556. (2) 1 H. & N. 369.

three-quarters saved on that road. From the evidence of the plaintiff's engineer who made the map, I would gather that there is doubt whether the disputed way renders the Broughshane road a shorter way to Ballymena than the Ballygarvey road. He says:—

"I do not *think* the Ballygarvey road is nearer than the path to Ballymena. On the contrary, I think the path is the direct road for him to Ballymena."

The plaintiff's evidence of damage is this. He says:—

"I was always in the habit of using it, and used it constantly—sometimes twice or once a-week. I mostly would be going to Ballymena. It is decidedly the best road from my house to Ballymena: better than the Ballygarvey road. I used it because it was a shorter and better way, and always used it walking till the bridge was broken down. Since that time I had to go round by Broughshane. I had to go half a mile or three-quarters of a mile farther round the corner of the Broughshane road. The Ballygarvey road is anything but a good road. I labour on my farm, and the extra bit of road would take me longer from my farm. Undoubtedly, I have had to pay for a seat on a car to go to Ballymena since the bridge was broken. [On cross-examination:] I did not take a car so often (*i.e.* to go to Ballymena) before the bridge was taken down. The car runs along the Broughshane road. [And on re-examination he adds:] I have been put to more expense by cars than before the bridge was put down."

A witness named M'Cosh, whose name had been struck out as a plaintiff, stated that he had seen the plaintiff Smith using the roadway often, and he knew

"that was the way he used to go to market to Ballymena, and every other body near him. I've seen above fifty at one time. [He added, on cross-examination:] I kept a horse and cart to go to Ballymena; and go sometimes by foot and sometimes by cart. I go by the Broughshane or Ballygarvey roads. They are two fair county roads. Smith gets things from Ballymena. He has no cart."

Now, what does that evidence amount to? Where are the servants whose valuable time and work have been consumed, and whom the plaintiff was prevented from employing during the time occupied in their taking a more circuitous route to Ballymena? On this head of damage there is not a particle of evidence, and the question of particular damage must be confined to the personal inconvenience caused to the plaintiff, to the alleged loss

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of his valuable time, and to the suggestion that he was put to some expense for cars beyond what he would otherwise have incurred. It is not unimportant to point out that the statement of claim abstains from alleging the incurring of such additional expense; but I shall deal with it as if it had been alleged; and I make this general observation on the evidence given in support of it, that there is nowhere to be found a statement that it was *by reason of* the more circuitous route that the plaintiff took the cars. It is plain that, being an old man of seventy years of age, he had been in the habit of taking cars before this footpath was obstructed, and it would have been reasonable to expect that, if he was relying on having to take a greater number *after* the obstruction and in consequence of it, he would have said so. He does not do so, but leaves the matter to whatever inferences the jury may be pleased to draw. It was all the more to be expected that he would endeavour to establish the connexion between the obstruction and this expenditure, inasmuch as his visits to Ballymena were but occasional, and are not deposed to have been in connexion with his avocation as a farmer. I am therefore of opinion that there was no evidence to go to the jury of the plaintiff having been put to any additional expense as a result of the obstruction.

Is, then, the loss of time involved in his having to take a more circuitous route to Ballymena a "particular damage" in the circumstances of this case, bearing in mind that no evidence has been given that the time which he lost on any occasion was of any pecuniary value whatever? If it be assumed without evidence that *every* man's time is of pecuniary value, and consequently that whenever the plaintiff went to Ballymena he necessarily suffered a pecuniary loss, it seems to me that every wayfarer, whether in the plaintiff's neighbourhood or from other directions, who had to use the more circuitous road, would be entitled to maintain an action. In such a case the element of particular damage wholly vanishes, and the settled rule of law must be regarded as abrogated. In my opinion, no case of any binding authority has gone the length of holding that a slight personal inconvenience, or a slight loss of time such as this case shows, could be regarded as particular damage within the rule. The earlier decisions (some of which are indeed inconsistent with one another) down to *Winterbottom* v.

Derby (1) are referable to facts quite distinguishable from those in the present case. Either the plaintiff's property was shown to be affected in value, or there were circumstances which established a personal injury, resulting in pecuniary loss. In *Iveson* v. *Moore* (2), where the way to the plaintiff's colliery was interfered with, it was held eventually, after a difference of opinion between the Judges in the Court below, that the action was sustainable, as the way was *the only way* to the colliery, and there was no necessity to show actual loss of customers. In *Hubert* v. *Groves* (3), where the plaintiff, a timber merchant, was obliged to bring his coals by a more circuitous way, it was held by Lord Kenyon that the action did not lie, and his decision was affirmed by the full Court. *Chichester* v. *Lethbridge* (4) and *Greasly* v. *Codling* (5) are the cases most favourable to the plaintiff. In the former it was held that it would be sufficient particular damage if the plaintiff's coach was obstructed by a ditch and gate across the road, in consequence of which he was obliged to go by a longer and more difficult way, *and if* defendant opposed him in his efforts to remove the nuisance. The damages in that case appear to have been only a penny; but it will be observed that apparently the plaintiff had to retrace his steps in consequence of the obstruction, and that the opposition by the defendant to his removal of the nuisance was one of the factors in the case: so that he may be said to have occupied a position different from that of the general public, and to have suffered a particular injury. In *Greasly* v. *Codling* (5) the plaintiff was a coal-higgler, and it was proved that when he could make four journeys in the absence of the obstruction, he could only make three while it existed. Best, C.J., held that injury from delay was sufficient to maintain the action; but his decision must, I think, be taken with the circumstances of the case, in which a real and substantial injury was proved, which must have resulted in pecuniary loss. *Blagrove* v. *Bristol Waterworks* (6) and *Chamberlain* v. *The West of London Railway Co.* (7) were cases of demurrer to the allegation of particular

(1) L. R. 2 Ex. 316.
(2) 1 Salk. 15; 12 Mod. 262.
(3) 1 Esp. 148.
(4) Willes, 71.
(5) 2 Bing. 263.
(6) 1 H. & N. 369.
(7) 2 B. & S. 605, 617 (Exch. Ch.).

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damage. In the former, actual loss of the plaintiff's and his servants' time—where time meant money, as in *Boyd* v. *The Great Northern Railway Co.* (1)—was alleged; and, in the latter, the business of occupiers of the plaintiff's houses was claimed to have been affected.

I now come to the later cases, and they, in my opinion, establish that the particular damage, in order to be actionable, must be of a substantial character. I need not refer to those cases where the obstruction is one legalised by Act of Parliament, and the claim is founded on the Lands Clauses Acts in respect of "lands injuriously affected"; for such an injury as is alleged here—an injury personal to the plaintiff, and not affecting the value of his property or business—could not be governed by those authorities. *Winterbottom* v. *Lord Derby* (2) was the decision of the English Court of Exchequer, consisting of Kelly, C.B., and Martin and Channell, BB. The footway was the shortest and most convenient way from the plaintiff's house to Prestwich, and he had been in the habit of using it for pleasure or profit. The judgment of the Court was given shortly after the decision of the House of Lords in *Ricket* v. *The Metropolitan Railway Company* (3), but before it appeared in the reports. In holding that the plaintiff must suffer some *substantial* damage peculiar to himself in order to maintain the action for obstruction, and that being delayed on several occasions and being obliged to pursue his journey by a less direct road, was not such peculiar damage, Kelly, C.B., referring to the judgments of the Lords in *Ricket's Case* (copies of which had been handed to him), said that it was impossible to look at these judgments without seeing that the learned Law Lords thought that the law had been too far extended in the direction of "allowing this class of action to be brought"; and, dealing with the facts of the case before him, he added that "to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could *not* be maintained." *Benjamin* v. *Storr* (4) was a decision of Brett and Denman, JJ. The cases, including those to which I have referred, were very fully discussed, and Brett, J., sums them

(1) [1895] 2 Ir. R. 556.
(2) L. R. 2 Ex. 316.
(3) L. R. 2 H. L. 175.
(4) L. R. 9 C. P. 400.

up by stating that *three* things must concur to give a right of action, viz. (*a*) particular damage or injury; (*b*) that such damage is direct; and (*c*) that it is substantial; and Denman, J., concurred, and remarked that the damage shown was clearly appreciable. In *Fritz* v. *Hobson* (1) Fry, J., referred to *Benjamin* v. *Storr* (2), if not with expressed approval, certainly without disapproval; and, in *The Caledonian Railway Company* v. *Walker's Trustees* (3) the Lord Chancellor, Lord Selborne, refers also, without any expression of disapproval, to *Winterbottom's Case* (4) as deciding that substantial damage was necessary.

I feel coerced by this weight of authority to come to the conclusion that in the present case there was no evidence to go to the jury of particular damage having been sustained, inasmuch as the injury (if any) proved is unsubstantial and the alleged damage inappreciable. I therefore think the verdict should be entered for the defendant.

It might be sufficient for me to close my judgment here, inasmuch as the other members of the Court will necessarily deal with the other branches of the case. The arguments have, however, been so full that the parties are entitled to the expression of my opinion, coinciding, as it does, with those of my brethren. I shall abbreviate my remarks as far as possible, having regard to the length to which my judgment on the first point has extended.

The defendant says that it was not he who removed the bridge, and thus obstructed the way. The only evidence offered on behalf of the plaintiff to show that the defendant did so was, first, a threat on his part that he intended to stop the way; and, secondly, a letter written by the plaintiff's solicitor, Mr. Caruth, to the defendant, on the 29th December, 1899, and the reply thereto by Mr. Currie, the defendant's solicitor, dated the 4th January, 1900 (5). If these letters should not have been admitted as evidence against the defendant, the requisition for a direction in defendant's favour at the close of the plaintiff's case ought to

(1) 14 Ch. D. 542.
(2) L. R. 9 C. P. 400.
(3) 7 App. Cas. at p. 270.
(4) L. R. 2 Ex. 316.
(5) These letters are set out in the judgment of the Lord Chief Justice, *infra*.

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have been complied with. But, in my opinion, these letters were proper evidence to be submitted to the jury, and the learned Judge was right in not excluding them. Mr. Caruth's letter calls defendant's attention to the fact that the defendant has recently removed the bridge and requires him to restore it. That letter was placed in the hands of Mr. Currie, and on the defendant's instructions he writes the letter of the 4th January, 1900, in which, on behalf of his client, he merely denies the plaintiff's right to the path. He takes no notice of the assertion that the defendant was the person who had removed the bridge and caused the obstruction. It seems to me that Mr. Caruth's letter was one which required more than a fragmentary answer such as it received, and that under the circumstances the not replying to the charge of removal of the bridge by the defendant must be regarded as acquiescence in the assertion that it was removed by him. The case is not one of no answer being given—which is often excusable and justifiable—but more nearly resembles the conduct of a party who, hearing certain charges made against him, and being in a position to admit or deny, allows them to pass without contradiction. In such a case his silence may be deemed to be equivalent to an admission of the charges. *Wiedemann* v. *Walpole* (1) is not in point, for it was a case of not answering letters in which the plaintiff had alleged a promise to marry, and defendant's silence was sought to be relied on as evidence in corroboration of the promise. It was held not to amount to such evidence. *Carne* v. *Steer* (2) is a case in which the mere denial by the plaintiff of matters stated in a letter which was read to him was held to be evidence of his admission of the facts. Finally, in *Joy* v. *Joy* (3), the not answering of a letter was held (Palles, C.B., dissenting) to be evidence to go to the jury on the defence of the Statute of Limitations. The circumstance of replying to one particular allegation in a letter and taking no notice of another seems to me to be a much stronger case to show acquiescence than the mere non-answering of a letter, and I therefore think that the two letters were proper evidence for the consideration of the jury.

I come finally to the question of dedication. For the proper appreciation of the facts three important periods of time will have

(1) [1891] 2 Q. B. 534. (2) 5 H. & N. 628. (3) 26 I. L. T. R. 12.

to be borne in mind—(*a*) from a date anterior to the 1st November, 1805, down to the year 1844; (*b*) from 1844 down to the date of the alleged obstruction, which took place some time in 1899; and (*c*) a small interval of two years from 1874 to 1876, when the servient tenement was in the occupation of the then owner in fee-farm, the late Mr. Justice Harrison.

The title is briefly as follows: The servient tenement is represented by mill premises and an adjoining field. The former were granted to Robert Harrison by the then owner in fee, Lord O'Neill, by deed of 1st November, 1805, for lives renewable for ever. On the 2nd May, 1844, Robert Harrison demised to Alexander and John Davidson all the mill premises for a term of forty years. Robert Harrison's title having vested in the late Mr. Justice Harrison, the Davidsons, on the 2nd May, 1874, surrendered to him all their interest in the forty years' lease. At that date the lease in perpetuity had been converted into a fee-farm grant by deed of 11th August, 1857. Mr. Justice Harrison remained in actual occupation from the date of that surrender till the 1st November, 1876, when he made a sub-fee-farm grant to Black. Black surrendered his interest on the 22nd August, 1892, and by agreement of the 2nd January, 1893, Mr. Justice Harrison agreed with the defendant for the assignment to him of all his estate under the fee-farm grant of 1857. A limited liability company was subsequently in 1896 formed to carry on business at the mill, and by documents in the latter year the defendant agreed with the Company for the sale to them of portion of the mill premises through which the substituted path runs.

It will be observed from this summary of the title that the representative of the grantee in the lease in perpetuity of 1805 was in actual possession of the premises from 1874 to 1876.

The title to the other premises known as the "long field," through which portion of the way in question passes, is derived under a lease of the 27th February, 1812, from Lord O'Neill to the same Robert Harrison for one life or twenty-one years, and a subsequent lease of the 29th March, 1866, from O'Neill to Harrison, for three lives or thirty-one years. These premises were assigned by Harrison to Black, and were also subsequently surrendered by the latter.

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The jury have practically found two rights of way. On clear evidence of long and continued user they found that from before the lease of 1805 down to 1844 there was a public right of way on foot from Knockeen, on the Broughshane road, through the long field, and thence through the mill premises to the high road leading to Ballymena. The evidence was, in my opinion, ample to support this finding. It appears that about 1844, after the lease of the 2nd May, 1844, the lessees, Messrs. Davidson, built a wall across the entrance of the path into the mill premises, and at the same time provided another path for a short distance running alongside this wall and taking up the old path further on. For the purpose of this substituted path a bridge was erected over the millrace, the removal of which has led to the present suit. The evidence is conclusive that from the date in 1844, when the new path was substituted, the old path as altered was accepted and used by all who had occasion to resort to it, without interruption, down to 1899. If the old path had continued unaltered, and was now relied on as the path over which the right was claimed, I cannot imagine how a jury could fail to establish it. But it is said that there is no dedication as against the late Mr. Justice Harrison, and the defendant, who claims through him, of the substituted path. The jury have found that Mr. Justice Harrison adopted and acquiesced in the alteration. That finding may be based on the fact that Mr. Justice Harrison, while his estate was only a reversionary one expectant on the determination of the lease of 1844, must have had notice of the altered user, or if not, that the continued user of the altered way, during Mr. Justice Harrison's own occupation of the premises from 1874 to 1876, is evidence of dedication sufficient to bind his estate. I do not propose to go into the authorities that have been cited with reference to dedication, as they will be dealt with by the other members of the Court, who think that on none of the grounds submitted should the verdict be disturbed. It is sufficient for me to say that there was evidence to go to the jury in support of a dedication by Mr. Justice Harrison, and that, under the circumstances, the way, in its altered condition, is binding on the present assignee of his estate.

MADDEN, J. :—

It is not seriously disputed that there is in this case a considerable body of evidence from which the jury were justified in inferring the dedication to the public by the owners of the soil, antecedently to the year 1844, of a public highway between the places marked "A" and "H" in the map before us. The plaintiff is the owner of a small farm adjoining the former of these places, and he has been in the habit of passing along the way in question on foot when visiting the market town of Ballymena, distant between four and five miles from his farm, thereby shortening the distance which he would otherwise have to travel along a county road by from a-half to three-quarters of a mile. He has been obstructed in the use of this way by the destruction of the bridge over which it passed; and I agree with my brother Kenny in thinking that there is evidence sufficient to maintain the finding of the jury that this obstruction is to be attributed to the defendant. I shall not deal at length with this branch of the case, on which we are all agreed. I shall only remark that the inference which, I think, may be fairly drawn from the reply given by the defendant's solicitor, evidently on his instructions, to the letter of the 29th December, 1899, appears to be strengthened by the evidence given by Mr. Richard Davidson of a conversation with the defendant, in which they discussed the closing of the right of way. As the bridge had then been destroyed, the closing of the way of which they spoke must have been that complained of by the plaintiff; and the defendant, when asked for his reasons for doing this act, said that he had a great fancy for planting the place, adding that roughs and idlers from Ballymena came out and trampled it.

I pass to the other questions involved in the case. The obstruction complained of did not take place on the highway originally dedicated to the public, but on a new and substituted passage, which came into existence under circumstances which render it necessary to refer to the title to the land over which the right of way was exercised.

The fee-simple of the entire of the land traversed by the highway appears to have been vested in a certain Earl O'Neill, who demised one portion of it to Robert Harrison for lives renewable for ever in the year 1805, and another portion to the same

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lessee in the year 1812 for an interest which is still existing. No question arises as to the latter portion, once it is established that the public right of way, so far as it crosses this portion of the land, was dedicated to the public, as against the owner of the fee.

The O'Neill estate has been proved to have been in settlement since the year 1841, and the defendant has thus displaced by affirmative evidence any presumption which might otherwise have arisen as against the owner in fee of a dedication of a right of way subsequently substituted for that which was originally created.

In the year 1844 Robert Harrison sub-demised to A. and J. Davidson for the term of forty years the portion of the land held by him under the lease of 1805, which is coloured pink on the map. At a date fixed approximately as somewhere between the years 1844 and 1850 John Davidson, the tenant in possession under the sub-lease of 1844, built a wall across the then existing highway, thereby closing it for carts and horses, and substituted, for the use of foot passengers, a bridge at the point "B" on the map, and a footpath from "B" to "C," in lieu of the then existing roadway. On the 2nd of May, 1874, Davidson's sub-lease was surrendered to Mr. Justice Harrison, on whom the interest of Robert Harrison had devolved, and he remained in possession until the 1st of May, 1876. The jury have found that Mr. Justice Harrison acquiesced in and adopted the dedication of this public right of way so altered. The defendant derives title under Mr. Justice Harrison; and the question arises whether he can lawfully obstruct the plaintiff in his use of the substituted way, so long at all events as the old highway remains unrestored.

Now the rights of the public as against the owner of land who closes up or obstructs a highway have been clearly settled from an early date. In *Duncomb's Case* (1) it was held that if the owner of a close over which there is a public highway obstructs the highway, he is bound to leave a sufficient way over his close, and to maintain it at his own charge; and in *Absor* v. *French* (2) it was held to be a good plea, in an action of trespass, that the plaintiff had himself stopped a highway, so that the defendant could not

(1) Cro. Car. 366. (2) 2 Show. 29.

pass, and that he therefore went over the plaintiff's close, doing as little damage as he could.

This right of deviation on the part of the public is recognised by all the Judges in the case of *Dawes* v. *Hawkins* (1), followed and applied by the Common Pleas Division in this country in *Neill* v. *Byrne* (2). The question upon which the Judges were divided in opinion in *Dawes* v. *Hawkins* (1) does not arise in the present case. There, on the closing of a highway by the owner of the soil, the public had deviated along an adjoining close belonging to a different owner, in regard to whom there was no express evidence of dedication. The majority of the Court thought it more reasonable to refer the user by the public of the substituted way to the exercise of their common law right of deviation than to infer a dedication by the owner of the adjoining close. In the judgment of Erle, C.J., the case before the Court was described as having "no analogy to the case where the owner of the soil of a highway shuts it up, and sets out a substituted highway over his own land in lieu thereof, which may be express evidence of an intention to give the public some right, either absolute or qualified, over the substituted way."

Now, if either Davidson or Mr. Justice Harrison were owners of the fee-simple of the soil between the years 1844 and 1876, this part of the case would be too clear for argument. No stronger evidence of the dedication of a substituted way could be conceived than the construction of a footbridge and pathway for the use of the public, and the subsequent adoption of the alteration. But Davidson's interest has determined, and Harrison's interest was originally that of a lease for lives renewable for ever, converted into an estate in fee-farm under the Renewable Conversion Act in the year 1857. The fee-simple being in settlement, no inference of dedication to the public by the owners of that estate could be drawn subsequently to the construction of the substituted right of way.

I am, however, clearly of opinion that the act of Davidson, adopted by Mr. Justice Harrison, amounts to a dedication of a substituted right of way which is good against all persons claiming

(1) 8 C. B. (N. S.) 848. (2) 2 L. R. Ir. 287.

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under the latter. Erle, C.J., in the judgment from which I have quoted, distinguishes between an absolute and a qualified right in the public to use a highway substituted by the owner of a close who obstructs an existing highway. The original dedication being unqualified, the subsequent qualification to which he refers could only be the result of a qualification or limitation in the estate of the owner of the close. If he were owner in fee-simple, the dedication would be absolute, and the only question which would remain was one discussed but not decided in *Dawes* v. *Hawkins*(1), as to the right of the public to continue the use of this way of substitution in the event of the original highway being re-opened. So long as it remains closed the right of the public to use the substituted way seems to me to be equally clear, whether it was provided in an unqualified manner by the owner of the soil, or subject to a qualification, by the owner of a lesser interest. So long as the lesser interest subsists, the qualified dedication cannot be abrogated. A highway being indestructible by mere disuse, the owner in fee-simple would be compellable, on the cesser of the particular estate, either to adopt the qualified dedication of the substituted way, thereby rendering it unqualified, or to re-open the original highway. If the original way remained closed, the public might continue to use the substituted way, in exercise of their right of deviation. The case would be different if there were evidence of long user of a substituted way sufficient in its circumstances to bind the fee-simple, in which case the extinction of the original highway by legal process might be presumed. Short of this, the substitution is qualified, not absolute.

I express no opinion as to the power of the owner of an estate in fee-farm created under the Renewable Leasehold Conversion Act to dedicate a highway as "owner of the soil" within the meaning of the authorities. I was much impressed by Mr. Harrison's argument. The statutable estate acquired under this Act is a peculiar one. It is subject to eviction for non-payment of rent, and the Legislature has recently enabled owners of this estate to avail themselves of the provisions of the Land Act of 1897. So long as the lease remained unconverted, the tenant

(1) 8 C. B. (N. S.) 848.

could not bind the fee-simple, and the conversion of his estate, for the purpose of simplifying tenure and avoiding renewals, is a purely statutory operation capable of being effected, as in the present case, by a limited owner of the superior estate. There was at one time a disposition which is illustrated by the case of *Billing* v. *Welch* (1) to apply to the statutable tenure thus created the ordinary incidents of an estate in fee-simple. But this case has, we are informed, been recently overruled by the Court of Appeal (2).

No doubt an owner of this class is seised of a freehold estate which will endure until it is terminated by eviction for non-payment of rent or by conversion into a present tenancy under the Land Acts; and he is in this sense and to this extent "owner of the soil." But so is the owner of a lease for lives renewable for ever, at all events since the Tenantry Act. This question does not arise in my view of this case; for the act of the defendant is, in my opinion, equally unjustifiable, whether the dedication of the substituted way was unqualified, or qualified, and limited to the extent of the interest vested in Mr. Justice Harrison.

The question remains, Has the plaintiff given evidence of particular damage of such a character as will suffice to maintain the verdict? The general principles of law governing this part of the case are clearly settled. If a mere wayfarer, passing along a highway in exercise of the right vested in him in common with the rest of the public, is stopped or obstructed, he suffers a wrong. He would have a right of action if the general principle of law, *ubi jus, ibi remedium*, applied. But certain exceptions have been engrafted on the general principle that there is no wrong without a remedy. One of these exceptions is where the wrongful act is an injury to the general public, no one of whom is injured more than the others. The reason of this exception is thus stated by Lord Coke:—"This the law provided for avoiding of multiplicity of suits, for if any one man might have an action all men might have the like." "If, however," (he adds) "he has special damage which is not common to others, he shall have an action on his case" (3).

(1) I. R. 6 C. L. 88.

(2) *In re M'Naul's Estate; Ex parte Traill*, [1902] 1 I. R. 114.

(3) Co. Litt. 56 a.

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I do not know that any of the cases which have been cited have added anything to the statement of the law which I have quoted, unless it be the statement by Brett, J., in *Benjamin* v. *Storr* (1), that the damage to be the foundation of an action must be not only particular, but direct and substantial. The cases throw some light on the kind of injury which will entitle a plaintiff to single himself out from the general public, but they give us little assistance when the amount of damage is in question.

The kind of injury complained of in the present case is not the deterioration in value of the plaintiff's farm. I therefore agree with my brother Kenny in thinking that the cases that have been referred to, decided on the Land Clauses Consolidation Act, do not assist us. Neither is it an injury to his person, directly caused by the obstruction. The injury of which the plaintiff complains is a permanent obstruction, depriving him altogether of the use of the direct and shortest mode of access on foot from his farm to his market town. This kind of injury is clearly actionable, on proof of substantial individual damage in the form of loss of time or money, resulting from the obstruction. *Blagrave* v. *Bristol Waterworks* (2) is an authority for the general proposition that an action lies when the substitution of the longer route adds substantially to the work and labour of the plaintiff and his servants. *Hart* v. *Basset* (3) is to the same effect; and a retail coal-higgler, who had been in the habit of using a certain highway for the purpose of carrying coals, was held to have suffered special damage by reason of its obstruction: *Greasly* v. *Codling* (4). "I am of opinion that the true principle is that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so": Kelly, C.B., *Winterbottom* v. *Lord Derby* (5). The footway obstructed in that case was simply the shortest and most convenient way from the plaintiff's house to an adjoining town. His user of it as such without proof of special damage was held to be that of the mere passer-by. But I cannot regard this

(1) L. R. 9 C. P. 400.
(2) 1 H. & N. 369.
(3) Sir T. Jones, 156.
(4) 2 Bing. 263.
(5) L. R. 2 Ex. 316, at 322.

phrase as applicable to a farmer who is deprived of his ordinary route to his market. Indeed, the distinction taken by Kelly, C.B., seems to me to be in favour of the plaintiff. It would, I think, be a misuse of language to describe a farmer who uses a highway as the usual mode of access to market as "a mere passer-by."

It is said that if an action lies at the suit of the present plaintiff, it lies at the suit of any farmer, no matter what his distance from Ballymena may be, whose journey may be lengthened by half-a-mile or so. A defendant guilty of obstructing a highway (who is, I may remark, a wrongdoer committing an indictable offence) must rely for protection against excessive multiplicity of suits on the common sense of jurors, who will be directed by the Judge that an action cannot be maintained except on proof of substantial individual damage.

The real question on this branch of the case is the substantiality of the damage, not the nature of the injury. I agree with my brother Kenny in regarding the evidence of damage as slighter in degree than in any of the cases that have been referred to. But I regard it as different in kind from that of the mere passer-by, and I do not think it is so unsubstantial in degree as to warrant a Judge withdrawing it from the jury. Loss of time in working a farm and occasional expenditure on car hire are realities which are, in my opinion, sufficient to support the fifth question. Reliance is placed on the fact that the verdict is for one shilling; and if the jury had themselves assessed the damage at this figure, it might have amounted to a finding that the damage, though special to the plaintiff, was not substantial. I, however, accept the statement of the plaintiff's counsel, that the plaintiff, having established his right, consented to the assessment of damage at a nominal figure. But it was plainly assessed as representing a substantial injury, for we must assume that the learned Judge, to whose charge no objection was taken, told the jury that they could not answer the fifth question in the affirmative unless the damage was, in their opinion, not only direct and individual but substantial.

On the whole, I am of opinion that the verdict should stand, and that the motion before us should be refused with costs.

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The substantial question is whether the dedication of the footpath as a public footway can be inferred. The evidence of user would justify such inference unless the defendant has proved that the state of the title made such a dedication impossible: *Reg.* v. *Petrie* (1); *Turner* v. *Walsh* (2). Where the user is ancient, and its origin is not shown, the mere circumstance that the land has been continuously held under lease does not displace the inference of dedication by the owner, whoever he was, before the lease was made: *Winterbottom* v. *Derby* (3).

Even where the user is shown to have commenced after and during a lease, the assent of the owner in fee may be inferred (notwithstanding that in most cases he is powerless to interfere) where the user has been so long and public that the owner must be taken to have been aware of it and assented: *Mann* v. *Brodie* (4); see Lord Blackburn's opinion: *Hanks* v. *Cribbin* (5), and *Deeble* v. *Lenihan* (6). The two Irish cases relate to private rights; but Monahan, C.J., in the former case (7) says that the only difference between the acquisition of public and private rights is that for the latter more lengthened user might be required.

There was clear evidence of dedication of the original way; and up to 1844 it must be taken that there was a lawful public footpath. The user of the substituted track after 1844, when the wall was built by Davidson, would support two inferences: one, that the owner in fee (if not prevented by settlement—which Serjeant Dodd says he was, save for two days, from 28th January, 1863, to 30th January)—assented to such substitution; the other, that the part of the old path that was cut off was lawfully extinguished in some way: *Williams* v. *Eyton* (8); *Leigh Urban Council* v. *King* (9). The Court always strives to account for ancient facts by a legal origin. In *Williams* v. *Eyton* (8) the user was for twenty-seven years. In *Rex* v. *Jolliffe* (10) proof

(1) 4 E. & B. 737.
(2) 6 App. Cas. 636.
(3) L. R. 2 Ex. 316.
(4) 10 A. C. 378, at p. 386.
(5) 7 I. C. L. R. 489.
(6) 12 I. C. L. R. 1.
(7) 7 I. C. L. R. 489, at p. 499.
(8) 2 H. & N. 771; 4 H. & N. 357.
(9) [1901] 1 K. B. 755.
(10) 2 B. & C. 54.

of twenty years' user was held to justify the inference of immemorial custom. Extinction, however, ought not to be presumed unless there was a legal and effectual dedication of the substituted part. *Doe* v. *Courtenay* (1), a case of surrender of a lease, illustrates this principle.

The trial proceeded on the Harrison adoption of the substituted part. There was evidence to support a dedication, if it could legally be made. It is said that such dedication would be impossible, as Mr. Justice Harrison was only grantee under a fee-farm grant under the Renewable Leasehold Conversion Act. I would be unwilling to hold that such grantee, who is the owner of the soil, could not dedicate, at least during his own *prima facie* fee.

Assuming, however, in defendant's favour, that he could not dedicate so as to bind the grantor's interest, such grantee could, where he had unlawfully diverted or assented to the unlawful diversion of an existing highway, bind himself and his estate by a temporary substituted way to be enjoyed by the public while the diversion continued. *Dawes* v. *Hawkins* (2) is not against this view. There the original interrupted way had been restored, so that the temporary substituted track had become unnecessary. The period of user here is much longer than in that case.

Whether the owner of a long term could dedicate so as to bind his own interest is a matter on which I offer no concluded opinion. It may seem inconvenient that the owner of a property held for an absolute term of 10,000 years rent free, or subject to a small rent, could not (at least so far as his own term extended) lay out roads and streets. In *The Attorney-General* v. *Biphosphated Guano Co.* (3) the question was raised in the Court of Appeal, but not decided. Fry, J., in *Powers* v. *Bathurst* (4), from an interlocutory remark, obviously thought the point could fairly be argued. Mr. Odgers, in his article on Highways in the Encyclopædia, states that a limited owner may, by his conduct, give the public a right against himself. If a road has been used for upwards of half a century by the public, must each person

(1) 11 Q. B. 702.
(2) 8 C. B. (N. S.) 848.
(3) 11 Ch. D. 335.
(4) 42 L. T. (N. S.) 123.

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using it inquire who has been the dedicating owner? See the judgments of Lord Denman, C.J., and Patteson, J., in *Reg.* v. *East Mark* (1). The cases cited by defendant's counsel all relate to the position of the owner in fee after a lease had expired.

I think that there was evidence to support a dedication of the original way by the owner in fee, and afterwards, so far as he lawfully could, of the substituted way by the owner in fee-farm; that such latter dedication bound the *prima facie* fee-simple under the fee-farm grant, at least during its continuance; and that, while the obstruction of the original way continued, the burthen of the substituted path was accepted, and bound the Harrison estate.

The other points raised are interesting mainly for connection with costs and technicality.

From the Year Book, 27 Henry 8, the rule of law has been that a civil action for a public nuisance can only be maintained where there is particular or distinctive damage more than or beyond that sustained by the community at large. The words "more than" and "beyond," according to Lord Penzance in *M'Carthy's Case* (2), point not so much to the species or description as to the degree of the damage. The rule is vague and ambiguous. Persons residing close to a high road which is obstructed and requiring to use it constantly sustain much greater inconvenience from the stoppage than those who, living at a distance, only may use it occasionally. Yet this increased inconvenience may not by itself constitute particular damage. On the other hand, the special damage may be sustained by all in the neighbourhood, and a plaintiff's right of action as an individual is not thereby affected. The uncertain extent and operation of the rule are strikingly exemplified in *Iveson* v. *Moore* (3), where, on a motion in arrest of judgment after verdict, the Court was equally divided as to the declaration disclosing a good cause of action. According to present ideas the cause of action was clear, and the Exchequer Chamber decided the case in favour of the plaintiff.

The meaning and scope of the rule can only be reached by consideration of case law. I shall first shortly refer to the

(1) 11 Q. B. 877. (2) L. R. 7 H. L. 263. (3) 12 Mod. 262; Willes, 74.

authorities at common law, and then take up the decisions on the Lands Clauses Code. The old common law cases are conveniently collected in the judgments of Erle, C.J., in *Ricket's Case* (1), and Willes, J., in *Beckett's Case* (2).

Three types of case may be at once laid aside as not apposite to the matter in hand: (*a*) those where there was direct physical injury; *Fowler* v. *Saunders* (3); (*b*) those where there was interference with direct access to and from premises fronting the highway: *Lyon* v. *Fishmongers' Company* (4); *Rose* v. *Groves* (5); *Fritz* v. *Hobson* (6); (*c*) and those where there was direct injury to the plaintiff's property: *Maynell* v. *Saltmarsh* (7).

The cases tending to support plaintiff's case are as follows:—

In *Iveson* v. *Moore* (8) it was held in the Exchequer Chamber that obstruction of a way forming the approach to a colliery was, without reference to loss of custom, a particular injury in respect to the owner's trade.

Chichester v. *Lethbridge* (9) decides that obstruction to carriages proceeding from a gentleman's residence to an adjoining town, where continued and deliberate, and where the defendant prevented the plaintiff from removing the obstruction, is actionable. The decision was based on two grounds: (*a*), that under the circumstances the continued obstruction caused peculiar injury; (*b*) that the defendant prevented removal of the obstruction. Willes, J., in *Beckett's Case* (2) adopts the former ground as set out in the marginal note, which is supported by Comyns' Digest, *Action on Case for Nuisance* (*c*). Erle, C.J., prefers the latter: *Ricket's Case* (1). The marginal note by the reporter, which is reproduced by Comyns and Willes, J., seems to be founded on the account of *Hart* v. *Basset* (10), given in the judgment. The damages were assessed at one penny.

In *Greasly* v. *Codling* (11) a coal-higgler was delayed four hours by an obstruction, and this, without evidence of special

(1) 5 B. & S. 156.
(2) L. R. 3 C. P. 82.
(3) Cro. James, 446.
(4) 1 A. C. 662.
(5) 5 M. & G. 613.
(6) 14 C. D. 542.
(7) 1 Keb. 847.
(8) 12 Mod. 262; Willes, 74.
(9) Willes, 71.
(10) Sir T. Jones, 156.
(11) 2 Bing. 263.

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damage, was deemed to establish that the plaintiff was more distinguished in injury than the rest of the community, there being an obvious loss of time and profit. The Judge had told the jury that the plaintiff must prove injury or expense. The jury having found for the defendant, a new trial was awarded. *Wiggins* v. *Boddington* (1), where the plaintiff, a wharfinger and carter, was delayed by the operations of a swing bridge, is a case of the same type.

Wilkes v. *Hungerford Market Company* (2), where an obstruction diverting customers from plaintiff's shop was held actionable, is hardly in point in reference to the present controversy. It is said to have been overruled by *Ricket's Case* (3). I am not certain of this so far as common law action for nuisance is concerned. If obstruction of the owner's locomotion to and from his place of business is or may be particular direct damage, why should obstruction of customers to such place of business be considered as necessarily remote and consequential? Business depends on custom; and if business is directly prejudiced by obstruction, I do not see why it should not be deemed to be a peculiar injury calling for civil redress. Take such a case as *Iveson* v. *Moore* (4), where the road to a colliery was obstructed. The real damage was from customers not being able to reach the colliery and carry away coals, though this was not apparently the ground of the judgment in the Exchequer Chamber. Holt, C.J., seems to have thought that damage from loss of custom from defamatory words would not be special damage (5).

Blagrave's Case (6), in the ninth count, complained of the stoppage of a footpath connecting two of the plaintiff's fields, and this was held sufficient on demurrer, though it averred only as general damage that it was necessary for plaintiff to go by a longer route, occasioning loss of time and expense. This case is the only successful one for actionable interference with a footpath, and may possibly be referred to injury to direct access.

In *Boyd's Case* (7) the unlawful closing of a highway for

(1) 3 C. & P. 544.
(2) 2 Bing. N. C. 281.
(3) 5 B. & S. 157.
(4) 12 Mod. 262; Willes. 74.
(5) 12 Mod. 268.
(6) 1 H. & N. 369.
(7) [1895] 2 I. R. 555.

twenty minutes by a Railway Company was held to give a doctor in large business a cause of action without any proof of specific damage, the loss of time in case of a professional man being equivalent to loss of money.

The cases adduced in favour of defendant's case are as follows: *Hubert* v. *Groves* (1), if good law—it is questioned in *Wilkes' Case* (2)—supports the defendant's view that obstruction of a street [leading] from business premises is not a particular damage. The plaintiff was a coal merchant, who complained that by reason of the obstruction of a street he was prevented from carrying on his business, and compelled to carry his coals by a circuitous and inconvenient way. The case is not satisfactory. The Court was not aware of the ultimate decision of *Iveson* v. *Moore* (3) in the Exchequer Chamber; and *Chichester* v. *Lethbridge* (4) was not cited. The decision in its obvious meaning is opposed not merely to *Iveson* v. *Moore* (3) and *Chichester* v. *Lethbridge* (4), but is contrary to *The Caledonian Railway Company* v. *Walker* (5). Lord Kenyon's assumption that the plaintiff, who was a trader, suffered no peculiar injury was, I think, wrong.

The principal authority relied upon was *Winterbottom* v. *Lord Derby* (6). It was held that the plaintiff, who sued only as a member of the public and not as an owner of premises specially served by the highway, and whose allegation of damage was founded not on injury to business, but on obstruction accompanied by expense incurred in removing the obstruction, could not maintain an action. It is to be noted that the Court declined to arrest the judgment, and only entered a non-suit on the plea of not guilty.

This decision seems opposed to the opinion of the Queen's Bench in *The Mayor of Colchester* v. *Brooke* (7), where Lord Denman says: "A public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents

(1) 1 Esp. 148.
(2) 2 Bing. N. C. 281.
(3) 12 Mod. 262; Willes, 74.
(4) Willes, 71.
(5) 7 App. Cas. 259.
(6) L. R. 2 Ex. 316.
(7) 7 Q. B. 339, at p. 377.

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a traveller from passing, and which he may therefore throw down." See also *Dimes* v. *Petley* (1).

I next take up the cases on the Lands Clauses Acts. Here I have to point out that though compensation for injuriously affecting lands is confined to cases where but for the enactment there would have been actionable wrong, a common law right of action often exists where no compensation would be recoverable, as, for example, where the injury is personal and founded on loss of trade or custom.

Much of the reasoning of Lord Chelmsford and Lord Cranworth in *Ricket's Case* (2) is rejected in *Metropolitan Railway Company* v. *M'Carthy* (3) and subsequent cases. The facts of *Ricket's Case* (2) are fully stated by Lord Selborne in his judgment in *Caledonian Railway Company* v. *Walker* (4). The actual decision was that loss of custom did not come within the compensation clauses of the Acts, the trading carried on on the premises being distinct from the estate in the premises themselves.

In *M'Carthy's Case* (3), the approach of M'Carthy's house to the Thames, a few yards distant, was cut off by the statutory works, which were not opposite the house, and were apparently 120 yards away (5). Lord Penzance (6) states that where proximity to any particular highway confers special value on premises, special damage arises from the destruction of the benefit of that proximity. According to Lord O'Hagan, where injury is directly caused by the works, it is immaterial whether such work is done beside or at a distance from the premises.

In *Caledonian Railway Company* v. *Walker* (4) there were approaches by several streets to Walker's premises. The facts found by the umpire are set out at page 291 of the report. Compensation was claimed on the ground that those occupying the premises would when going in certain directions be obliged to make a *detour*, and would also when going in certain directions encounter a steeper gradient (7). Lord Blackburn pointed out (8) that the question depended on the degree of proximity.

(1) 15 Q. B. 276, at p. 283.
(2) L. R. 2 H. L. 175.
(3) L. R. 7 H. L. 243.
(4) 7 App. Cas. 259, at p. 281.
(5) 7 App. Cas. 304.
(6) L. R. 7 H. L. at p. 263.
(7) 7 App. Cas. 293.
(8) *Ibid.* 299.

These cases decide that interference with a highway forming the approach or one of the approaches to premises may, though at some distance away, injuriously affect such premises to such an extent as to support a claim for compensation. *A fortiori* may such interference amount to particular damage justifying a civil action for nuisance. Without any proof of specific loss, the stoppage of a highway may, under certain circumstances, supply evidence, and cogent evidence, of injury. Suppose a farm cut off from a neighbouring market town by the sole road thereto being interrupted or by the nearest road being blocked, making it necessary to make a *detour* of twice the distance; or take a villa deprived of access to the sea; or a country house cut off from its railway station.

In the present case the path is in close proximity to the plaintiff's premises. It is used for market purposes by the plaintiff, who is a farmer; it is considerably shorter than the ordinary highway; the Ballygarvey road is not so good, and is apparently longer; and the plaintiff has had to take a car oftener. The round he must take in consequence of the loss of the footpath would, I calculate, cost the plaintiff, an old farmer of seventy years of age, nearly half an hour each time he walks to Ballymena on his business. The obstruction is intended to be permanent; it is not casual or temporary. The existence of a public footway is challenged. I think there is some evidence on which a jury might find that the plaintiff had sustained peculiar direct and substantial damage in farm, business, and expenses. No doubt the case is not so strong as if a carriage road had been stopped; but still there is some distinctive injury. It may be said that if the plaintiff can sue, every other farmer in the neighbourhood who used the path may be able to do the same. This may be so; but every nuisance which affects large sections of the community, *e.g.* nuisance from chemical works or a small-pox hospital (*Hill's Case* (1)), or from a collection of explosives (*Cowper Essex Case* (2)), is open to the same remark. Everyone who individually sustains particular injury can apply for damages or an injunction; *Soltau* v. *De Held* (3). The objection founded on the

(1) 6 App. Cas. 193. (2) 14 App. Cas. 153. (3) 2 Sim. (N. S.) 133.

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necessity of peculiar injury is an artificial one. The object of suing is not to onerate the defendant with damages, but to get the way restored. There is little danger nowadays of the multiplicity of actions which two centuries ago seems to have alarmed the Judges. Indictment is a more inconvenient and less efficacious remedy than a civil proceeding by injunction suit or action for damages.

Mere inconvenience, as in *Winterbottom* v. *Derby* (1), may not be enough; but where premises are prejudicially affected by a direct near approach being permanently stopped, and replaced by a circuitous and longer way, or where business will be impeded, or additional expense may be probably necessary in consequence of the change, direct damage may be inferred. The only adverse authority is *Hubert* v. *Groves* (2); but that case seems to me opposed to the tendency of the authorities as a whole, particularly to *The Caledonian Railway Co.* v. *Walker* (3). The *quantum* of damage in money was not put to the jury; and I would infer that the one shilling found was directed by the Judge with the plaintiff's concurrence.

The last point urged for the defendant is that there was no evidence connecting the defendant with the act of obstruction. The correspondence is, however, pregnant with the admission that the defendant accepted responsibility for what had been done, and relied on justification only. This is not a case of mere silence. It is much more like a statement in conversation with a defendant, which he did not dispute. The defendant was not examined; and there is no evidence that there was any mistake or oversight in the solicitor's letter, written apparently under defendant's direct instructions. The destruction of the bridge was in the defendant's interest and in accordance with his wishes. I do not think that the case could have been withdrawn from the jury, who were at liberty to disregard the evidence of the defendant's son. The Judge was apparently satisfied with the verdict.

The questions as to damages and the act of obstruction are material mainly as to costs. As the finding as to the right cannot

(1) L. R. 2 Ex. 316. (2) 1 Esp. 148. (3) 7 App. Cas. 259.

be interfered with: *Winterbottom* v. *Derby* (1), all costs on that finding must be borne, in any event, by the defendant: *Wagstaffe* v. *Bentley* (2), even if he was entitled to the general verdict.

LORD O'BRIEN, L.C.J.:—

The questions presented for our determinatien in this case are certainly not unattended with difficulty. Serjeant Dodd, who opened the case for the defendant, seemed to rejoice in the vista of difficulty that he presented. I own that I did not share in his gratification, and should have much preferred that the issues raised were of a simpler character.

The questions are practically these—

1. Was there evidence of the doing of the acts complained of?

2. Was there evidence of special damage? and, if so, was special damage found by the jury?

3. Can a grantee in a fee-farm grant dedicate a public right of way?

4. Was there evidence to sustain in this case a finding of a substituted way, and was it legally competent to dedicate it under the circumstances of the case?

I shall deal with these various questions in the order in which I have stated them.

Was there then evidence of the doing of the acts? I think that, having regard to the letter of the plaintiff's solicitor directed to the defendant, and dated the 29th December, 1899, it is supplied in the letter of the defendant's solicitor of the 4th January, 1900. These letters are as follows:—

29th December, 1899.

SIR,—On behalf of Messrs. Jeremiah Smith, William Armstrong, John Armstrong, and many others, we have to request you to replace the portions of the bridge over your land, recently removed by you, and restore the bridge or footway to its original condition. Our clients claim a right of way where this bridge has been for fifty years and upwards, and chiefly repaired and maintained by them and their predecessors. By your removing the stays or main supports of the bridge you have obstructed the right of way, and our clients in repairing it.

Unless, therefore, the portions of the bridge removed by you are restored

(1) L. R. 2 Ex. 316. (2) [1902] 1 K. B. 121 (A. C.).

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within one week, our clients will be reluctantly obliged to institute proceedings in respect thereof.

Your obedient servants,

J. & A. CARUTH.

J. K. WILSON, ESQ.,
Race View, Broughshane.

4th January, 1900.

DEAR SIRS,—Mr. J. K. Wilson, of Race View, has handed me your letter to him of the 29th ult., written on behalf of Messrs. Jeremiah Smith, William Armstrong, John Armstrong, and many others.

My client denies the right claimed by your clients; and if they think of instituting proceedings, I will accept service, on Mr. Wilson's behalf, of any document you may wish to serve.

Yours truly,

JOHN K. CURRIE.

MESSRS. J. & A. CARUTH,
Solicitors, Ballymena.

The letter of the plaintiff's solicitor was very specific indeed in its character. What took place? The defendant's solicitor replied in the letter which I have also read; and it is not suggested for a moment that the defendant's solicitor was not authorized by the defendant to write that letter; and it is evident from the letter that the sole ground of defence relied upon was not that the defendant did not do the acts, but that there was no right of way. Anyone reading the letter of the 4th January would say that the sole ground of defence was a denial of the right of way, and not denial of the commission of the acts. I think that any barrister that read that letter, say at consultation or otherwise, would say that the only question in contention was the existence of the right of way. And, if this is so, is there not, having regard to what is denied, some evidence of admission of that which is not denied, and which was so specifically stated? On reading the letter of the 4th January, in reply, I should come immediately to the conclusion that the instructions to defend were limited to a denial of the right of way claimed. Once, of course, there was any evidence to go to the jury of the commission of the acts, they might regard all the other circumstances in the case—the non-production of the defendant, who, they might consider, was "lying low" and

conniving at the commission of the acts while cleverly endeavouring to evade responsibility. They might also take into consideration the statement of the defendant, made to Davidson, that he would close the right of way.

On the first question, then, I agree with my brethren that there was evidence of the commission of the acts. As to this we are unanimous.

I next turn to the question of special damage, in respect of which my brother Kenny differs from the other members of the Court. It is certainly a question upon which there may well be a difference of opinion, although I confess that I have myself upon consideration come to a clear conclusion on the matter. What then is the question? As to this, there is no difficulty. The question is, was there special and particular damage? Did the plaintiff sustain special and particular damage? All the authorities are concurrent as to the question, though there may be some difference of opinion as to the *amount* of evidence necessary to establish special and particular damage. Some of the Judges have made use of the expression "distinguished in injury." Was the plaintiff *distinguished in injury* from the rest of the public? The clearest and most authoritative statement on the subject is to be found in *Metropolitan Board of Works* v. *M'Carthy* (1), where Lord Penzance says that the question is—Did the plaintiff sustain any damage "more than" or "beyond" that sustained by the general public?

Now, turning to the evidence in this case, what does it establish? It establishes that the defendant has lost his shorter and more convenient road to his market town. His way to market, going and returning, may have been lengthened by about a mile or a mile and a-half. As to this it is better to read his own words. The plaintiff in his evidence states:—

"Until the bridge was taken down I was always in the habit of using it, and used it constantly—sometimes twice or once a-week. I mostly would be going to Ballymena. It is decidedly the best road from my home to Ballymena; better than the Ballygarvey road. I used it because it was a shorter and better way, and I always used it walking till the bridge was broken down. Since that

(1) L. R. 7 H. L. 243, at p. 263.

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time I had to go half-a-mile or three-quarters of a-mile round the corner of the Broughshane road. I labour on my farm, and the extra bit of road would take me longer from my farm. Undoubtedly, I have had to pay for a seat on a car to go to Ballymena since the bridge was broken."

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This is what the plaintiff states, and three matters substantially are established by it—that the plaintiff has lost his shorter and better road to his market town, that by reason of this he is kept longer from his farm, and that on some occasions he has had to pay for a car. Are these circumstances which distinguish the plaintiff in injury from other members of the public—the ordinary wayfaring public? That circumstances of such a kind may constitute "special" or "peculiar" damage is established by *Blagrave's Case* (1), upon which the pleading here is founded. To my mind these circumstances constituted an injury beyond what the general wayfaring public have sustained by the obstruction of the way. During the argument I ventured to observe that if a person of a more opulent class is thinking of taking a house in the country, the first thing he asks is, what is its distance from the railway station and from the market town? Those are the two questions that are generally put first, at least they are inquiries to which great importance is attached. But if proximity to a market town is important to the well-to-do and more opulent classes of society, I would say *a multo fortiori*, it is of importance to a comparatively very humble man who works on his farm, whose presence on his farm is absolutely essential, and who is damnified by the absence from his farm either of himself or of his servant, who would else be engaged at work upon it. The plaintiff in effect states all this. He states, besides, that he had to pay for a car. To my mind all this is evidence of special damage. It is sufficiently set out in the pleading, and if necessary the plead can be amended.

Well, what is the question put to the jury—"Has the plaintiff sustained any injury beyond what is common to the public at large?" These are almost the very words approved of by Lord Penzance in *M'Carthy's Case* (2). The jury answered the question in the affirmative. Their attention must therefore

(1) 1 H. & N. 369.

(2) L. R. 7 H. L. 243.

have been directed to this evidence—to what appears to me to be the very point of it—and they found a verdict of one shilling, which certainly was not given under the head of nominal damages, but in reference to their finding that this man had been specially damaged beyond other members of the general public.

Therefore, although I think there is a difficulty in the matter, I have come to a clear conclusion that there was evidence of special damage proper to be submitted to the jury, and that the question was properly put to them. Why is it that the ordinary wayfarer is not permitted to sue? Is it to prevent the multiplicity of actions? That is good sense and law, but it is also good sense and law that if an individual suffer special injury, however small, he shall have his right of action; and that, as the remedy by indictment is inadequate, it is in practice more useful to leave his common law rights of action to any person who has suffered particular and special damage.

Upon the third and fourth questions I agree with the other members of the Court. Upon the question of the right of way we all concur. I merely wish to emphasize the fact that a vast body of evidence of user was proved at the trial. For myself, I should be prepared if necessary to hold that the grantee in a fee-farm grant, being the owner in fee of the soil, has power to dedicate a way in perpetuity. It is, however, sufficient for the purposes of this case, to hold that a dedication by such grantee is good while his interest lasts.

Upon a consideration therefore of all the facts of the case, we must decide that the verdict was right, and we refuse the motion with costs.

Solicitor for defendant: *J. K. Currie.*
Solicitors for plaintiff: *J. & A. Caruth.*

A. E. R. J.

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Nov. 27, 28. Dec. 1.

LOWDENS, Appellant; KEAVENEY, Respondent (1).

Street—Obstruction—Procession—14 & 15 Vict. c. 92, sect. 3, sub-sect. 3.

L. was one of a band, playing party tunes through the streets of Belfast. The band was followed by a large crowd. A constable cautioned the band against playing through a particular street, as an obstruction would be caused. The band persisted in playing through such street, and the crowd followed, with the result that the free passage of foot passengers and vehicles was temporarily interrupted. L. being charged before the magistrates, under 14 & 15 Vict. c. 92, s. 13, sub-s. 3, the magistrates found as a fact that free passage was obstructed, and that the obstruction was caused by L. and the other members of the band, and the crowd accompanying them, and was the direct result of the band playing in the street in question, in spite of the police warning, and they accordingly convicted L. :—

Held, that the conviction must be quashed, the magistrates having overlooked or omitted to decide the real question, which was, whether the user of the street was, under the circumstances, reasonable?

Filson v. *Morell* (22 I. L. T. R. 7) distinguished.

The law of processions through the streets considered.

Case Stated under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions District of Belfast, the appellant, with twenty other persons, was charged in a summons under 14 & 15 Vict. c. 92, s. 13, at the suit of the respondent, for that he, on the 8th April, 1901, did wilfully prevent and interrupt the free passage of persons and carriages in a public street in the city of Belfast. The charge was duly heard, and nineteen of the defendants named in the summons, including the appellant, were ordered to be fined in the sum of 20*s.* and costs each.

On the application of the appellant the present case was stated, the material portions of which were as follows :—

"At the hearing of the said complaint it was proved by Head Constable William Sargent that at about 8.40 o'clock on the morning of the 8th day of April, 1901, when on duty at Carlisle

(1) Before Lord O'Brien, L.C.J., and Gibson and Boyd, JJ.

Circus, in the city of Belfast, he saw a crowd and a band there. There were about 400 persons altogether. He spoke to the man who was brought to him as being the leader of the band. He also spoke to the men who were there with the drums. He cautioned them against playing going down Clifton-street or Donegall-street. He said that at Donegall-street the street was so narrow it would cause an obstruction, and that if they played down past Carrick Hill it might cause a riot A man named Arthur Trew then came and spoke to him. He asked the head constable if he meant to prevent the band playing at all. The head constable said no, and swore that he told him what he told the band. Trew then said he would be responsible for the band, and would defend it in the Courts. He then ordered the band to play on. Going down Clifton-street they played a party tune down almost to Carrick Hill. There were a number of policemen at Carrick Hill to prevent a riot. In Donegall-street he saw foot passengers obstructed, and cars also. He saw several cars which had to come to a stop. He saw foot passengers having to take refuge in doorways and side streets. The crowd in Donegall-street swept the whole street. Other constables were examined and corroborated this evidence, and identified the defendant Thomas Lowdens, or Lowans, as being one of the members of the band.

"Witnesses were called for the defence who proved that the defendant and the other members of the band were proceeding from Carlisle Circus to the Northern Counties Railway Station, and that through Clifton-street, Donegall-street, and York-street was their direct way; they swore that they did not see any obstruction, and could not tell whether or not party tunes were played.

"The summons was brought under 14 & 15 Vict. c. 92, s. 13, and the solicitor for the defendant contended that there was no obstruction within the meaning of the statute. We were of opinion, however, that there was no material difference between this case and that of Filson appellant, Morell respondent, decided by the Queen's Bench Division of the High Court of Justice in Ireland on the 12th day of November, 1887.

"After having heard the complainant and defendants and their

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respective solicitors, we found as a fact on the evidence produced before us (and of which notes are annexed and are to be taken as incorporated herewith) that in Donegall-street on the occasion in question the free passage of foot passengers and vehicles was obstructed, that several of the foot passengers had to take refuge in doorways, and that vehicles had to come to a standstill; and we further found as a question of fact that the said obstruction was caused by the defendant and the other members of the band and the crowd accompanying them, which, in the words of Head Constable Sargent, 'swept the whole street,' and that it was the direct result of the band playing in Donegall-street in spite of the police warning not to do so, and we accordingly adjudged the defendants guilty of having wilfully prevented and interrupted the free passage of persons and carriages within the meaning of the 14 & 15 Vict. c. 92, section 13, and we fined each of them, including the said Thomas Lowdens, or Lowans, in the sum of 20*s.* and costs, and hereupon the judgment of His Majesty's High Court of Justice in Ireland, King's Bench Division, is required as to whether the defendant was legally responsible for the obstruction to the public thoroughfare caused by the band playing, the defendant being a member of the band who played after being cautioned by the police to desist."

George Hill Smith (with him *Serjeant Dodd*), for the appellant, the defendant:—

Filson v. *Morell* (1), which will be relied on for the respondent, does not apply; there the act of obstruction relied on was not the causing a crowd to assemble, but the defendant's own act of beating a drum. There was no evidence of wilful obstruction here. Every citizen has a right to pass and repass on the King's highway; if the procession had stopped for any length of time it might have been different, but it kept moving. [He referred to *Ball* v. *Ward* (2); *R.* v. *Long* (3); *Barber* v. *Penley* (4); *Horner* v. *Cadman* (5); *Fearnley* v. *Ormsby* (6); *R.* (*Collins*) v. *The Justices*

(1) 22 I. L. T. R. 7.
(2) 33 L. T. (N. S.) 170.
(3) 59 L. T. (N. S.) 33.
(4) 62 L. J. Ch. 623.
(5) 16 Cox, 51.
(6) 4 C. P. D. 136.

of Co. Fermanagh (1); *M'Kee* v. *M'Grath* (2); *R. (Orr)* v. *The Justices of Londonderry* (3).]

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The Solicitor-General (Campbell, K.C.), and *C. Atkinson*, for the respondent:—

The present case is governed by *Filson* v. *Morell* (4), and is an even stronger case. Everyone must be presumed to intend the natural and probable consequences of his acts; and here the obstruction was the natural and probable consequence of the defendant's acts: *Horner* v. *Cadman* (5); *R.* v. *Carlile* (6); 1 Russell on Crimes (6th ed.), 787; *R.* v. *Moore* (7); *Bellamy* v. *Wells* (8); *Walker* v. *Brewster* (9); *R.* v. *Pemberton* (10); *R.* v. *Latimer* (11). There was evidence that the user here was unreasonable. On the question of unreasonableness of user account must be taken of the surrounding circumstances, such as the width of the street, the condition of the traffic, the size of the crowd, &c. The magistrates have a right to apply their local knowledge.

Serjeant Dodd, in reply:—

This is in reality an attempt to restore the Party Processions Acts, which have been repealed. None of the cases cited on the other side apply to people passing to and fro. The act here was lawful, and malice cannot be inferred from a lawful act: *R.* v. *Tolson* (12); *Sherras* v. *de Rutzen* (13).

Cur. adv. vult.

Dec. 1.

LORD O'BRIEN, L.C.J.:—

This case, which was most ably argued at the Bar, is one of very considerable importance. In its consequences it is calculated to affect not merely the citizens of the city of Belfast, but the citizens of Dublin, Cork, and Limerick; indeed, the inhabitants

(1) 14 L. R. Ir. 50.
(2) 30 L. R. Ir. 41.
(3) 28 L. R. Ir. 440.
(4) 22 I. L. T. R. 7.
(5) 16 Cox. 51.
(6) 6 C. & P. 636.
(7) 3 B. & Ad. 184.
(8) 39 W. R. 158.
(9) L. R. 5 Eq. 25.
(10) L. R. 2 C. C. R. 119.
(11) 17 Q. B. D. 359.
(12) 23 Q. B. D. 168.
(13) [1895] 1 Q. B. 918.

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of every city and town in Ireland. To understand the question involved it is necessary shortly to state the facts.

A man named Thomas Lowdens was charged before the magistrates in Belfast for having wilfully caused an obstruction in the public street. The charge was brought under the 14 & 15 Vict. c. 92, s. 13, which provides that any person who wilfully prevents or interrupts the free passage of persons or carriages in the public street should be subject to the criminal liability thereby created. This was the charge—what were the facts? The facts and grounds of decision are succinctly set forth in the case stated for our determination by the magistrates.

[His Lordship read the portions of the case set out above.]

Now, then, we know what the charge was—what the evidence adduced to sustain it was; we also know the conclusion at which the magistrates arrived; and, what is of essential importance in the case, the reasons upon which their judgment was founded—the grounds of the judgment.

It is perfectly plain that the ground of the judgment was, that the members of the band, of which the defendant was one, persisted in playing, though cautioned not to do so, and thereby caused a physical obstruction in the street, and that as the defendant was one of the members of the band who so acted he was accordingly guilty.

Now how was this decision sought to be sustained in argument? In all the earlier stages of the argument the position taken was this, that every person is presumed to intend the natural and probable consequences of his act; that the procession on the day in question did in fact create a physical obstruction; that this was the natural and probable consequence of the procession passing through the street; and that accordingly the defendant being presumed to intend the natural consequence of his act, was rightly convicted of wilfully creating an obstruction. That was the proposition that was pressed, as I have said, in the earlier stages of the argument. As a test of the soundness of that proposition I instanced three or four cases. Take, as I said, the case of the funeral of some distinguished man—some great Minister of State—some great military commander—some citizen prominent for his civic virtues, or some distinguished ecclesiastic. The funeral

may consist of so many thousand persons, that the whole street, to use the language of the police sergeant, may be swept and the greatest physical obstruction caused—traffic brought absolutely to a standstill. Everyone knows that such a funeral is sure to cause a great physical obstruction. It is the natural and probable consequence of the funeral procession moving along the street. I asked was every man who took part in such a procession obnoxious to criminal liability for so doing. It would, indeed, be a very anomalous state of the law if that were so. A funeral may be a most edifying manifestation. A large funeral whose numbers pass beyond the circle of private friendship is often, if not always, the tribute of the living to the conspicuous virtues which had distinguished the dead. Take again a regiment of soldiers marching along a street, playing a martial air, which invariably attracts on the footway an accompanying crowd which, if coming against you, you cannot get through. Take again some great civic pageant when the streets are thronged. Take the case of a trades procession. How often have we seen, especially in London, cabs and carriages brought to a standstill whilst the procession was passing?

These instances show that taking part in a procession which has caused obstruction in the street and the natural and probable consequence of taking part in which was that obstruction would ensue is not enough to create liability under the statute. There must be something more. What more must there be? What other condition is necessary? This, namely, that the user of the street was an unreasonable one. The necessity for the existence of this condition is obvious, and the law on the subject is clear. It is authoritatively stated by Sir George Jessel in his most attractive judgment in the case of *Original Hartlepool Collieries Company* v. *Gibb* (1). But in the latter stages of the argument before us it was suggested that the user on the day in question was eminently unreasonable. I do not for a moment deny that there may have been evidence in the case that the user was unreasonable, but in the careful formulation of their reasons the magistrates have made it manifest that this was not a ground of their judgment. The ground of their judgment, as I have already said, was that the band

(1) 5 Ch. D. 713.

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continued to play after being warned not to do so, and that caused an obstruction. These were the grounds of the judgment, and these alone. They did not, nor do they, at all indicate that they considered the question whether the use of the street by a moving body in the way it was used was an unreasonable one. There may be considerable obstruction and yet the use of the street may be quite reasonable. As to playing a party tune, this is not unlawful; and as to the warning of the police, no doubt prudent and well-disposed citizens will promptly accede to the suggestions of the police, and will be slow indeed to incur the reproach which would naturally arise from disregarding the advice of those who are charged with the preservation of public order; but, having regard to the charge in this case, the warning of the police could not merely of itself render the user of the highway unreasonable. It was for the magistrates to determine the question of the reasonableness or unreasonableness of the use of the highway—this essential element they omitted—and, accordingly, the conviction must be quashed.

The case of *Filson* v. *Morell* (1) has been referred to. That case is not reported in the authorized Reports, and there are no reasons advanced in the judgment as reported in the *Irish Law Times.* The report of the case is eminently unsatisfactory; but at all events, if I have to choose between it and the case decided by Sir George Jessel, *Original Hartlepool Collieries Company* v. *Gibb* (2), I certainly adopt the latter, which I think well decided.

GIBSON, J.:—

The conviction in this case is under the Summary Jurisdiction Act, 1851, 14 & 15 Vict. c. 92, sect. 13, sub-sect. 3, for wilfully preventing and interrupting free passage in Donegall-street, Belfast. The prosecution is not for violation of orders for preventing obstruction under the Police Clauses Act, 1847, c. 89, sect. 21, or under similar Acts, nor for illegality in the behaviour or objects of the procession. On the case we must deal with the procession as lawful, apart from the alleged wilful obstruction of the thoroughfare.

(1) 22 I. L. T. R. 7. (2) 5 Ch. D. 713.

The following points arise for consideration: 1. What is the construction of the enactment on which the prosecution is based? 2. Was there any evidence to warrant a conviction? 3. Is the decision vitiated by any mistake or oversight on the part of the magistrates?

Before approaching the statute of 1851 I shall briefly refer to the common law. A public highway is primarily for the free passage of the public for all reasonable purposes of business or pleasure; but persons using such highway may stop on lawful occasions, as *e.g.* for the purpose of taking up or discharging persons or goods at adjoining houses, provided that in so doing they do not unreasonably interfere with corresponding rights of others. Where the use of the highway is unreasonable and excessive, that is a nuisance, irrespective of any guilty or wrongful intent on the part of the wrongdoer: *Reg.* v. *Stephens* (1). Examples of such nuisance from illegitimate use are, where a physical obstruction is placed on the thoroughfare, or where a merchant, by continuously keeping vans before his door, practically appropriates for his business purposes part of the roadway: *Original Hartlepool Collieries Co.* v. *Gibb* (2); *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (3); or where one collects a stationary crowd blocking a substantial part of the street. There are many cases deciding that such unlawful or unreasonable user amounts to a common law nuisance. No authority, however, has been cited in reference to a moving crowd, between which and a stationary assembly there is marked distinction: *R.* v. *Carlile* (4).

Processions may use the streets for passage on lawful occasions and for lawful objects; and provided the user is reasonable there is no nuisance. The Party Processions Acts, which were directed against processions calculated to excite animosity between the members of the community, are now repealed; and intrinsically a procession with a band is no more illegitimate than a funeral. The obsequies of an illustrious soldier or statesman, a Lord Mayor's show, the Judges' procession to St. Paul's or to Court,

(1) L. R. 1 Q. B. 702.
(2) 5 Ch. D. 713.
(3) [1900] 1 Ch. 276.
(4) 6 C. & P. at p. 649.

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a lifeboat collection, a large ball, may all occasion a certain amount of incidental, and even substantial, obstruction to free passage; but they are not wrongful if they do not unreasonably encroach on the rights of others. A temporary and trivial inconvenience of rare and casual occurrence is not a nuisance. There must be give and take. In estimating a nuisance some regard must be had to the incidents of everyday life. In the *Brighton* v. *Hove Supply Association Case* (1), Vaughan Williams, L.J., at p. 283, says that he does not think there can be found any case, at all events of an indictment, in which there has been a conviction upon evidence merely showing an excessive user of a lawful right.

Prima facie a procession, moving along a thoroughfare in a peaceable manner, would not be a nuisance; but it might become so if the right was exercised unreasonably or with reckless disregard of the rights of others. An example is afforded by *Reg.* v. *Long* (2). Young men at Littlehampton were in the habit of walking arm-in-arm up and down the footpath, thereby driving others, including ladies, off the path. They persisted, though remonstrated with by the police. They were prosecuted under the Police Clauses Act, 1847, c. 89, sect. 28, for wilfully causing obstruction, and convicted. The conviction was reversed by the Divisional Court, not on the ground that their conduct was not a nuisance, but because section 28 was confined to obstructions of a specific class, and did not extend to such misbehaviour as was charged. The report in the *Law Times* does not disclose the *ratio decidendi*, which distinctly appears in the *Times'* report. The conduct of the accused in *Long's Case* (2) was plainly wilful obstruction under our Act; and neither individuals nor a procession guilty of such conduct could escape responsibility on the pretext that they kept in motion. No body of men has a right to appropriate the highway and exclude other citizens from using it. The question whether user is reasonable or not is a question of fact to be determined by common sense, with regard to ordinary experience. Occasion, duration of the user, place, and hour must be considered; and we must ask was the obstruction trivial, casual, temporary, and without wrongful

(1) [1900] 1 Ch. 276. (2) 59 L. T. (N. S.) 33; 4 *Times'* L. R. 584.

intent. The matter is very much one of degree, and the whole circumstances must be kept in view before coming to a decision.

Bearing in mind the common law, I now proceed to the statute (14 & 15 Vict. c. 92). Section 13, sub-section 3, deals with prevention and interruption of three kinds. Counsel agreed to describe the offence as obstruction. Is the obstruction contemplated such an obstruction as would be in the nature of a common law nuisance, or does the statute extend to every physical obstruction apart from any question of reasonableness? I think the former view is the correct one. The offence which the statute creates is subject to a restriction from which common law nuisance is free. To constitute a nuisance there need be neither intent nor negligence, whereas wilfulness or negligence is a necessary ingredient in at least two of the classes of obstruction specified in the section.

Assuming that the conduct struck at by the Act is a kind of unlawful obstruction like nuisance, and not innocent obstruction (so to speak) resulting from reasonable user, what is the meaning of "wilfully"? The term is one which has been the subject of much variety of definition, and its effect shifts in different statutes. It usually connotes to a certain extent wrongful intent: *Reg.* v. *Badger* (1); *Reg.* v. *Tolson* (2); *Smith* v. *Barnham* (3). Where the Act is *per se* tortious, as where the highway is knowingly trespassed on by the imposition of a material obstruction, there is no difficulty; but where it is a measuring cast, whether the use of a right is reasonable or excessive, it would be hard to convict where the defendant acted in good faith, with a reasonable (though erroneous) belief that what was done was justified as being within the limits of lawful user, though if he acted recklessly he would be guilty of wilful obstruction.

2. Next, does the evidence support the conviction? The evidence is very loose. On Easter Monday morning, about 8.30 a.m., in rain and storm, a procession with a band formed at Carlisle Circus, and proceeded thence through Donegall-street playing party tunes. The head constable cautioned the leader of the band (of which the defendant was a member) against playing when going down Clifton-street and Donegall-street, as Donegall-street was so narrow it would cause an obstruction, and

(1) 6 E. & B. 137. (2) 23 Q. B. D. 168. (3) 1 Ex. D. 419.

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at Carrick Hill it might cause a riot. The head constable, on whose evidence the case turns, states that he saw foot passengers and cars (he does not say how many or how long) obstructed, the former having to take refuge in doorways and side streets. The crowd (according to him) "swept" the whole of Donegall-street. Three other police constables were examined. One says he saw no obstruction. Another is silent as to whether there was an obstruction or not. The third states that one vehicle was obliged to stop, and the footpath was blocked the whole way down, so that anyone coming up could not pass. He does not mention that anyone was obstructed in point of fact.

The evidence does not disclose what was the duration of the supposed obstruction—a vital matter—or the number of persons who at that early hour were in the street, and who could have been or were obstructed. There is no distinct statement that the band caused the crowd, though this may be inferred. There was no complaint made by anyone supposed to be obstructed; and the objection of the police was addressed (counsel contend) rather to the character of the music than to the procession, *qua* procession. The persons on the footpath (counsel on both sides agree, though the case does not so state) were the crowd, who, not forming part of the procession, followed and accompanied it. So far as I can collect, the obstruction on which the conviction proceeds is the presence of this crowd, estimated by the police as consisting, with the procession, of 300 or 400 persons.

Serjeant Dodd contended that a casual temporary inconvenience caused by the presence of a crowd accompanying the procession would not be such an obstruction as the Act deals with. The head constable, obviously from an answer he gave on cross-examination, considered that troops leaving Belfast, with music or otherwise, could be summoned for obstruction—a curious opinion. Every public function or show attracts onlookers, but there may be a distinction between an exhibition which attracts a stationary crowd, and a case where the attraction arises in the ordinary course of lawful locomotion. If troops with a band or a Lord Mayor's show could not be made answerable for obstruction caused by spectators congregating on the footpath, it is argued that lawful processions may occupy a similar position. I do not

decide this. The case is not quite the same as the one put in argument of a well-known character appearing in a public thoroughfare disguised as a Zulu, with the result that a disorderly crowd follows. Here the procession was *prima facie* doing what was lawful.

Serjeant Dodd urges that the evidence shows nothing more than what takes place in every part of the country where there is any public function or demonstration. That may be so, but though it may supply an argument, it is not decisive that obstruction of such a kind is lawful. The decision depends on *quantum* and reasonableness.

From the local knowledge of the magistrates, the case may bear a more serious aspect than the evidence conveys to a reader, and I should hesitate to decide, and do not decide, that the evidence was not sufficient to support a conviction. It is the Justices who must decide on the facts, and we cannot review their conclusion if there was evidence to support it.

3. Assuming that there was such evidence, is the conviction vitiated by a mistake or oversight on the part of the magistrates?

They thought the case was covered and concluded by *Filson's Case* (1). Save that there was a band in the two cases, there is not much resemblance between them. The obstruction in *Filson's Case* (1) was the noise of a drum which frightened restive horses. The drummer persisted in beating his drum after warning, regardless of consequences. It was the drum and not a procession that caused the obstruction. If the drummer was alone his conduct would have been equally obstructive. Here to justify a legal conviction the magistrates had to decide that a crowd was collected by the band playing; that the band was legally responsible for such crowd, a matter of some difficulty; that what occurred was an unlawful obstruction, exceeding the limits of reasonable use of the highway; and that the obstruction was intentional or reckless wrongdoing.

Again the magistrates appear to attach to the police warning an efficacy it does not possess. In my judgment, if what the

(1) 22 I. L. T. R. 7.

K. B. Div. 1901.

LOWDENS, *Appellant;* KEAVENEY, *Respondent.*

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defendants were doing was a reasonable exercise of their rights, no police warning could affect the matter. If their conduct, on the other hand, was unreasonable and amounted to a nuisance, such warning might assist in reference to wilfulness, though it would not be conclusive. The police caution could not relieve the magistrates of the duty of determining the question of wilfulness for themselves.

From the form of the question put to the Court, and from the terms of the case, particularly the reference to *Filson's Case* (1), I fear that the Justices overlooked the difficult and delicate considerations which enter into the determination of common law nuisance where such nuisance consists in excessive user of a right and not in an extrinsically wrongful act. In their view apparently any obstruction arising from the band playing was necessarily unlawful and as a matter of law became wilful if the band played after being cautioned by the police to desist. The question put is very special and unusual. It is not whether upon the facts and evidence the defendants might have been and were properly convicted, but apparently whether guilt results as a necessary legal consequence from obstruction caused by the band continuing to play after the police caution. This Court can only answer questions of law, and cannot advise the Justices as to inferences of fact. To this question of law put to us the answer must be negative. There may be (as I have pointed out) innocent obstruction as well as obstruction of a guilty character. Physical obstruction (which is what the Bench had in mind) continued after police warning is not necessarily such intentional or guilty wrongdoing as the statute contemplates. In *Filson's Case* (1) what the defendant did was the same as if he obstructed the horses by putting a pole across. He deliberately used a noisy drum for the purpose. There was no question of lawful or reasonable use of the highway. The magistrates seem to have overlooked the real point in this case.

BOYD, J., concurred.

Solicitor for the appellant: *N. Tughan.*
Solicitor for the respondent: *Sir P. Coll.*

J. G.

(1) 22 I. L. T. R. 7.

DOYLE *v.* FOLEY AND OTHERS (1).

K. B. Div. 1901. April 20. May 13

Executor de son tort—*Statute of Limitations—Chattels real—Next-of-kin—Administrator.*

A person who has gone into possession of chattels real of a deceased, as executor *de son tort*, and remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, rely on the Statute of Limitations in answer to an action for the recovery of the lands brought by a person taking out administration to the deceased.

CASE STATED by the Lord Chief Baron on the hearing of a civil bill appeal.

The appeal was from a decree for possession pronounced by the County Court Judge of Kerry, on the 9th November, 1900, in an action of ejectment on the title for the recovery of certain lands of which one John Doyle was tenant prior to and at the time of his death. John Doyle died on the 6th April, 1887, leaving a widow, Margaret Doyle, but no children. His next-of-kin at the time of his death were his brother Patrick Doyle, and several nephews and nieces, children of a deceased brother and sister. The next-of-kin living when the ejectment was brought consisted of nephews and nieces of deceased. Margaret Doyle entered into possession of the said lands on the death of John Doyle, as executrix *de son tort* of the said John Doyle, as was found by the Lord Chief Baron, and continued in such possession until her death, which occurred on the 11th January, 1900. In the year 1887 Margaret Doyle married the defendant Daniel Shea, who thenceforward resided upon the lands with his wife until her death. In the year 1888 Margaret Shea purchased the lands under the Land Purchase Acts. On the death of his wife Daniel Shea entered into possession of the lands. The other defendants in the civil bill were persons claiming under the will of Margaret Shea.

(1) Before LORD O'BRIEN, L.C.J., and JOHNSON, GIBSON, and BOYD, JJ.

K. B. Div. 1901. DOYLE v. FOLEY.

Administration to John Doyle, deceased, was on the 12th February, 1900, granted to the plaintiff, a niece of the deceased, who brought the present proceedings.

In answer to the defendants' plea of the Statute of Limitations, the plaintiff relied *inter alia* on a document signed by Margaret Shea in the year 1894, as being an acknowledgment sufficient to take the case out of the statute, but this point was abandoned on the argument in the King's Bench Division.

The Lord Chief Baron stated that, in consequence of the purchase by Margaret Shea, he would if necessary have amended the civil bill into an equity civil bill. He also stated that it was to be taken that any inferences of fact which might arise in the case were drawn by him in favour of the plaintiff.

The question submitted by the Lord Chief Baron for the Court was, whether there was evidence on which he could hold that the plaintiff was entitled to a decree for possession.

A. M. Sullivan, for the defendant:—

The plaintiff's claim is barred by the Statute of Limitations. Even a rightful executor is not an express trustee so as to take the case out of the statute, and, *a fortiori*, an executor *de son tort* is not such.

Sandford, for the plaintiff:—

An executor is in the position of a trustee, and the statute does not run in his favour. The same applies to an executor *de son tort*, who has all the liabilities of a rightful executor.

[The following cases and statute were cited:—*Rankin* v. *M'Murtry* (1); *MacCormack* v. *Courtenay* (2); *Quinton* v. *Frith* (3); *Mulkearn* v. *Dorian* (4); *Molony* v. *Molony* (5); *Hoey* v. *Hoey* (6); *Burnside* v. *Burnside* (7); *Dwyer* v. *Whittelegge* (8); *Davies* v. *Williams* (9); *In re M'Clure and Garrett's Contract* (10); *Webster*

(1) 24 L. R. Ir. 290.
(2) [1895] 2 I. R. 97.
(3) I. R. 2 Eq. 396.
(4) 17 I. L. T. R. 74.
(5) [1894] 2 I. R. 1.
(6) 31 I. L. T. R. 11.
(7) *Ibid.*
(8) 33 I. L. T. R. 179.
(9) 34 Ch. D. 558.
(10) [1899] 1 I. R. 225.

v. *Webster* (1); *In re Rowe* (2); *In re Davis* (3); *In re Lacy* (4); *Tench* v. *Glennon* (5); 51 & 52 Vict. c. 59, s. 8.]

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Cur. adv. vult.

May 13.

LORD O'BRIEN L.C.J.:—

I am glad that this question was reserved by the Lord Chief Baron, because there was a general impression at the Bar during my time that an executor appointed by will was an express trustee, and could not therefore take the benefit of the Statute of Limitations, and that an executor *de son tort* stood in the same position in this respect. Our decision in the present case will rectify that impression.

The net point, so appropriately raised, is whether or not a person who enters upon a chattel interest as an executor *de son tort* and remains in possession in that character for upwards of twelve years can set up the Statute of Limitations, it being assumed that he is not in the position of an agent for any of the parties entitled, and that no question arises of estoppel or infancy. In our judgment he can in such case avail himself of the statute. *In re Lacy* (4), and the cases there referred to, establish that a rightful executor is not an express trustee, and can take advantage of the statute. It has been said, however, that an executor *de son tort*, though he has all the liabilities, has none of the privileges of a rightful executor. This proposition applies with reference to the administration of assets, that is to say, so long as the subject-matter can be regarded as assets. But where a person has been in possession for twelve years he is entitled, in the absence of any of those qualifying elements to which I have referred, to say that the property is no longer assets. I think the decision in this case should be for the defendants.

JOHNSON, J.:—

John Doyle, a small farmer in the county of Kerry, died in 1887, possessed of a chattel interest in a few acres of land, without issue, and leaving Margaret, his widow, and his next-of-kin, a brother and some nephews and nieces.

(1) 10 Ves. 93.
(2) 58 L. J. Ch. 703.
(3) [1891] 3 Ch. 119.
(4) [1899] 2 Ch. 149.
(5) 34 I. L. T. R. 157.

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The case finds that on his death his widow "entered into possession of his land as executrix *de son tort*, and continued in such possession until her death." She subsequently purchased the land under the Land Purchase Acts, and married her second husband, the defendant Shea, and lived with him on the land until her death, upwards of twelve years after John Doyle's death. The defendants claim under her, and rely on the Statute of Limitations. Upwards of twelve years after John Doyle's death the plaintiff (one of his next-of-kin) obtained administration to John Doyle, and instituted the present ejectment in the County Court. The plaintiff's title, as administratrix, runs from the date of the death of John Doyle: *Re Williams* (1). It is not contended that the document set out in the case (paragraph 7) is an acknowledgment of title by Margaret Shea, otherwise Doyle, within the statute, and it is not necessary, therefore, to discuss the authorities on that point. The net question for decision is whether the defendants claiming under Margaret Shea, otherwise Doyle, have acquired a title under the Statute of Limitations. The position of an executor *de son tort*, and the reason why he is not treated merely as a trespasser, is explained in *Read's Case* (2) :—

> Resolution 1. "When a man dies intestate, and a stranger takes the intestate's goods and uses them or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be that he was never executor, nor ever administered as executor, and therefore it was objected that he ought to pay debt or legacy, or do something as executor, yet it was resolved and well agreed that when no one takes upon him to be executor, nor any hath taken letters of administration, there the using of the goods of the deceased by anyone, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong, for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts."

The third resolution in the same case concludes—

> "Note, reader, these resolutions and the reason of them, and by them you will better understand your books, which otherwise seem *prima facie* to disagree."

(1) 34 Ch. D. 558.

(2) 5 Rep. 33 *b*.

And it has been held that a suit for an account to the extent of assets received will lie against an executor *de son tort*: *Coote* v. *Whittington* (1), and see *Re Lovett* (2); or he may be sued for a separate sum in his hands without involving him in the general accounts of the estate: *Penny* v. *Watts* (3); or jointly with the rightful executor: *Carmichael* v. *Carmichael* (4). In short, he is subject to the liabilities, but has none of the privileges, of a rightful executor. But unless the plaintiff can make out that Margaret Shea, otherwise Doyle, was an express trustee, she cannot, in my opinion, succeed in the present ejectment, because the Statute of Limitations excepts only cases of express trust, and we have not been referred to any authority that an executor *de son tort* is as such *virtute officii* (if that expression is appliable to such imputed duty) an express trustee. Even a rightful executor is not *virtute officii* an express trustee. In the instructive case *Re Davis* (5), Lindley, L.J., p. 124, is reported to have said: "An executor was always in a loose sense a trustee for creditors and legatees, since he held the personal estate for their benefit and not for his own; but such a trust does not take the case out of the statute. An executor cannot be deprived of the benefit of the statute by showing that he is a trustee; it is necessary to make out that he is an express trustee." Even, therefore, if it could be made out that Margaret Shea, otherwise Doyle, by entering on her late husband's chattel land was a constructive trustee, yet, nevertheless, she and those claiming under her are entitled to rely on the Statute of Limitations, which bars the plaintiff's claim. The present case has no resemblance to the numerous decisions which have been referred to on civil bill appeals, where a husband or father has died intestate, and the widow or children possess themselves of the intestate's property without taking out administration, and deal with the chattels, according to their beneficial interests or otherwise, by express or implied agreement between themselves, or where the children are minors and the widow has been held to be bailiff for them of the farm of the intestate.

(1) L. R. 16 Eq. 534.
(2) 3 Ch. D. 198.
(3) 2 Ph. 149.
(4) 2 Ph. 101.
(5) [1891] 3 Ch. 119.

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GIBSON, J.:—

The document dated the 24th May, 1894, was a contract with James Doyle, and was plainly not an acknowledgment of title on which the administrator could rely. The question before us entirely depends on whether the mere entry of the widow as executrix *de son tort* constituted her an express trustee. According to *Re Lacy* (1) a rightful executor is not an express trustee for next-of-kin; a wrongful executor cannot *a fortiori* be such trustee. In a particular state of facts, an inference of express trust: *Soar* v. *Ashwell* (2), *Mulhern* v. *Dorian* (3); or agency: *Burdick* v. *Garrick* (4), *Lyell* v. *Kennedy* (5); or estoppel: *Board* v. *Board* (6), *Dalton* v. *Fitzgerald* (7), may on the evidence be drawn by the Court, and in such case the protection of the Statute of Limitations is excluded. A common example is where the mother of infant children becomes executrix *de son tort* in respect of her late husband's farm. But *prima facie* the relation of an executrix *de son tort* to a deceased person's estate, though it creates certain executorial liabilities, is not fiduciary. In all the authorities cited it was assumed by the Court that in the absence of special circumstances such an executor could rely on the statutory bar: *Re M'Clure and Garrett's Contract* (8). There are here no facts to support any inference of express, or even of constructive, trust; there is nothing to establish agency or estoppel. The widow acted throughout for her own personal benefit; and the plaintiff is barred.

BOYD, J., concurred.

Solicitor for the plaintiff: *E. J. Downing.*
Solicitor for the defendant: *Terence J. Liston.*

J. G. T.

(1) [1899] 2 Ch. 149.
(2) [1893] 2 Q. B. 390.
(3) 17 I. L. T. 74.
(4) L. R. 5 Ch. 233.
(5) 14 A. C. 437.
(6) L. R. 9 Q. B. 48.
(7) [1897] 1 Ch. 440; [1897] 2 Ch. 86.
(8) [1899] 1 I. R. 225.

R. (SCOTT) *v.* JUSTICES OF LONDONDERRY (1).

K. B. Div. 1902.

Nov. 3, 5.

Summary jurisdiction—Justice—Competency—Chairman of district council—Expiration of office—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *s.* 26—*Application of Enactments Order* (22*nd Dec.*, 1898), *Article* 37.

Under the Local Government Act, 1898, sect. 26, and the Application of Enactments Order (22nd December, 1898), Article 37, the chairman of a district council is entitled to continue to act as a Justice of the Peace until his successor has accepted office and subscribed the required declaration.

CERTIORARI. This was a motion to discharge a conditional order for a writ of *certiorari* directed to the Justices of Londonderry to remove and quash an order made by them at Maghera petty sessions on 31st May, 1902, convicting the present applicant upon a charge of being found concealed at night upon certain private premises with unlawful intent. The complaint came on for hearing on the 26th April, 1902, before the resident magistrate, Captain Welch, and Mr. C. Convery, chairman of the Magherafelt rural district council. Witnesses having been examined, and arguments addressed to the Bench on matters not material to this report, the Court reserved judgment until the next Court day, 31st May, 1902, when an order of conviction was made by the resident magistrate and Mr. Convery, binding the defendant to be of good behaviour. The defendant's solicitor objected to the competency of Mr. Convery to adjudicate on the ground that an election of rural district councillors had taken place the previous day (May 30th) (2), and that he had therefore ceased to be *ex-officio* a Justice of the Peace, and that until re-election as their chairman by the new district council it was not competent for him to act, and defendant's solicitor applied that the case be reheard. This objection being overruled, the defendant now sought by *certiorari* to quash the Justices' order, on the ground of want of

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

(2) See Local Government Act, sect. 94, sub-sect. (7).

K. B. Div. 1902.

R. (SCOTT) *v.* JUSTICES OF L'DERRY.

jurisdiction, and "that the Court by which said order was made was improperly constituted by reason of the fact that Charles Convery, who sat as one of the members of the Court, was not then a Justice of the Peace."

Section 94, sub-sect. 8, of the Local Government Act, 1898, provides:—

"Outside a county borough the old county and rural district councillors shall retire, and the newly elected councillors shall come into office, on the day next after the said day of election of councillors, which day shall be the ordinary day of retirement of councillors."

The ordinary day of election of the chairman and vice-chairman of a rural district council is the fifth day after the day of election of councillors (sect. 94, sub-sect. 7).

Section 26 (1) of the Local Government Act, 1898, provides:—

"Where an urban or rural county district in any county contains a population . . . exceeding 5000, the chairman of the council for the district shall, unless a woman or personally disqualified by any Act, but subject as hereafter provided by this Act, be during the term of and by virtue of his office, a Justice of the Peace for the county; but, except when sitting in quarter or general sessions, shall act only within the petty sessional district or districts comprising the county district, or any part of the county district."

Article 37 of the Application of Enactments Order of 22nd December, 1898, provides:—

"37.—(1) The term of office both of the chairman and of the vice-chairman of a county or rural district council shall be one year; but he shall continue in office until his successor has accepted office and made and subscribed to the required declaration.

"(2) Subject to any rules made from time to time by the county or district council, anything authorized or required to be done by, to, or before the chairman, may be done by, to, or before such vice-chairman."

The Solicitor-General (*J. H. Campbell, K.C.*), and *C. Atkinson*, for the Crown, now moved to discharge the conditional order. They submitted that the policy of the Act was to provide that these local councils should never be without a chairman, and never without a representative on the Bench of Justices. The chairman of a rural district council was a Justice of the Peace, not by reason

of his being a councillor, but by virtue of his office as chairman. The prolongation and continuation of his office (by Article 37 of the Application of Enactments Order) entitled him to continue to act as a Justice (just as it entitled him to continue to act as chairman even if not as a member of the council) until his successor accepted office. As to the case of his re-election, see sect. 95. Counsel referred to the corresponding provisions in the English Acts of 1835 and 1882, and to *Reg.* v. *Owens* (1); *Reg.* v. *Stanley* (2); and *Bland* v. *Buchanan* (3). Apart from any question arising from the fact that this complaint had been fully heard on the 26th April, it was therefore competent for Mr. Convery to sit and adjudicate on the 31st May.

Gaussen and *Bartley*, for the defendant in the Court below, contended that the council had retired from office (Transitory Provisions Order, 1898, Article 15), and had ceased to exist on the 31st May; that Mr. Convery had thereupon ceased to be qualified as a councillor. His continuance as chairman beyond the "term" of his office could not extend his right to act as a Justice, for that privilege was conferred only "during the *term* of his office," viz. one year. Clause 2 of Article 37 went to show that the extension mentioned in clause 1 referred to his duties as chairman only. The language and effect of the English statutes of 1853 and 1882 was different. Under the Irish Act of 1898 the council ceased to exist at the end of three years; their then chairman ceased to be qualified as a councillor, and therefore as a chairman. If unqualified or disqualified, he could no longer be held to be entitled to act as a Justice by virtue of an office the term of which had come to an end. The conviction, therefore, ought to be quashed.

Cur adv. vult.

The judgment of the Court was delivered by—

GIBSON, J.:— Nov. 5.

The question in this case is, whether Mr. Convery, as chairman of a rural district council, was competent to act as Justice

(1) 2 E. & E. 86. (2) 11 A. & E. 882. (3) [1901] 2 K. B. 75.

K. B. Div. 1902. R. (Scott) v. Justices of L'derry. Gibson, J.

under the following circumstances. The prosecution against Scott came on for hearing on April 26, 1902, before the resident magistrate and Mr. C. Convery, chairman of the Magherafelt rural district council, when witnesses having been examined and the case argued, the Court reserved judgment until the next Court day, May 31st, 1902. An election of rural district councillors took place on May 30th, and when the case came on defendant's solicitor objected that as the new council came into office on May 31st, Mr. Convery was no longer Justice, and could not adjudicate. The decision of the question raised depends on the effect of the Local Government Act, section 26, and Application of Enactments Order, 22nd December, 1898, section 37. Scott's counsel rely on two points:—1, section 37 of the Order does not apply where the council has ceased to exist and the chairman is no longer a councillor; 2, under section 26 of the Act the chairman was only Justice during the term of his office, and under section 37 of the Order the term of office was one year only.

As to the first point, section 37 is taken from the Municipal Corporations Act, 1882, which applies to mayors and councils renewed by sectional elections of one-third each year. The section was presumably intended to bear the same meaning as the language in the English Act; it is expressed in general terms without qualification, and it is hard to restrict it to the first and second years of the council, leaving the third uncovered. The apparent policy of the statute was that the chair of the district council, a continuing corporation, should be always occupied. Accordingly, in the Transitory Provisions Order, 22nd December, 1898, sect. 10, sub-sect. 3 (Vanston, p. 161), at the first meeting of the rural council the first business is to choose one out of their number to be chairman of the meeting, then additional councillors are to be chosen, and next the chairman of the council for the year is to be chosen. Sect. 35 of the Application of Enactments Order, 22nd December, 1898 (1), which relates to subsequent annual meetings after the first, says nothing at all about choosing a chairman of the meeting, it being obviously assumed the outgoing chairman of the council will be in the chair to preside over the election of his successor.

(1) Vanston, p. 198.

Analogous legislation will be found in 3 & 4 Vict. c. 108, s. 83, which provides that the mayor shall continue in his office for one whole year, and until his successor shall have accepted office and made and subscribed the prescribed declaration. In the case of such borough one-third part of the council went out annually. This statute has no enactment corresponding with 5 & 6 William 4 c. 76, section 26, that the mayor and aldermen during their respective offices continue to be members of the council of the borough, notwithstanding anything thereinafter contained as to councillors going out of office at the end of three years—a provision repeated in the Municipal Corporations Act, 1882, section 38.

Scott's counsel contend that where the council go out in a body at the end of the third year the chairman disappears with the rest; that he cannot be a member of the new council, there being no provision in Ireland corresponding with the above sections of the English Act of 1835 and 1882; that the cases cited on behalf of the prosecution can be distinguished on that ground; that it is absurd to suppose that a chairman could have a casting vote if he had no original vote; and that a chairman could not act if disqualified. These arguments are of considerable force, and it is unfortunate that this important and difficult problem affecting local government generally should have to be determined in a criminal case where there can be no appeal.

With some doubt I have formed an opinion adverse to Scott's contention. The policy of the section appears to be (like 3 & 4 Vict. c. 108) to keep in office a continuous head of the corporation. Whether the council goes out in sections or at once seems immaterial. The continued chairman or mayor is more or less supernumerary (to adopt Mr. Justice Crompton's expression in *Owens' Case* (1)), and he drops off when he is replaced by a successor in the chair. The purpose of section 26 of the Act of 1835 (repeated in section 38 of the Act of 1882) was not to validate or give effect to the mayor's extension of office. Section 49 of that Act directs only that the mayor shall continue in office for a year, and says nothing about prolonging the office till he has a successor

(1) 2 E. & E. 88.

K. B. Div. 1902.

R. (Scott) v. Justices of L'derry.

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ready to take his place; and the Irish statute 3 & 4 Vict. c. 108, which does prolong the office, has no section corresponding with section 26 of the English Act. In the Act of 1882, section 15, which enlarges the tenure of the office, is intended, I think, to have independent and substantive operation; it is not dependent for its effect on section 38. In *Reg.* v. *Owens* (1), section 26 of the Act of 1835 was alone relied on, as section 49 did not prolong the office. *Bland* v. *Buchanan* (2) supports my interpretation of section 37 of our order. It was decided in the construction of a provisional order statute relating to Gloucester, and no reference was made to or reliance placed on section 38 of the Act of 1882. Section 15 was apparently considered the governing provision.

It is next asked how can the outgoing chairman act as chairman of the said council and have a casting vote if (not being a member of the council) he has no original vote. On this point of capacity to vote I offer no final opinion. Assuming that the outgoing continued chairman could not give an original vote, he might still under section 35 (Vanston, p. 198), give a casting vote in case of equality of votes: see *Reg.* v. *Stanley* (3).

The objection as to the difficulty of a chairman acting if disqualified does not arise. Section 37 of the Order does not relate to disqualification, but only to a qualified chairman going out by efflux of time. Section 94 of the Act, sub-section 14, continues his qualification as registered elector. Mr. Convery is not shown to have been disqualified in any way.

I am of opinion that section 37 prolongs the outgoing chairman's office as head of the corporation, notwithstanding that the members of the council have gone out of office on a triennial election. I do not think that the Court can read into the wide language of the section an implied restriction that the office is continued only so long as the existing councillors hold office, or only while the chairman is an existing member of the council. In other words, it extends to all the chairmen during three years, and is not restricted to the chairmen of the first two years.

Assuming that the office is continued, it is next argued that Mr. Convery was only Justice for one year (section 37 expressly

(1) 2 E. & E. at p. 88. (2) [1901] 2 K. B. 75. (3) 11 A. & E. 869.

stating that the term of office shall be one year), and that the enlargement and extension of the office until his successor had accepted office and qualified was prefaced with the word "but," and could not be regarded as part of the "term of office" proper.

Looking at 3 & 4 Vict. c. 108, sections 83 and 84, and section 29 of the Towns Improvement Act, 1854, I think that "term of office" in sections 3 and 26 of the Act means "duration of office." The object of the Legislature is that the council chair shall be always full, and that there shall be a permanent representative local magistrate on the bench. If Mr. Convery as chairman was in office on May 31st his term of office was unexpired. In section 37 of the Order I cannot give "but" the very drastic effect attributed to it by Scott's counsel. In section 83 of the Act 3 & 4 Vict. c. 108 the continuance in office is prefaced by "and," not "but." Is the meaning different? I think not. "But" is only used as corrective, and does not indicate that the extension of office is different in quality or function from the office during the year. The duration of the office is extended. The extended period is not different from the year of office proper. The office is continued as the same office.

I am of opinion that the objection to Mr. Convery's competence as Justice fails, and that the conditional order must be discharged.

Solicitor for applicant: *T. A. M'Lernon.*
Solicitor for respondents: *Sir P. Coll.*

A. E. R. J.

K. B. Div.
1902.
Nov. 3, 4, 16.

THE KING (MULCAHY) *v.* THE CHAIRMAN AND JUSTICES OF CO. TIPPERARY (1).

*Justices—Quarter sessions—Equal division of votes—Adjournment—Discretion—*Certiorari*—Mandamus—Licensing Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 12.

In discretionary applications to quarter sessions, where there is an equal division of opinion among the Justices, and they decline to make the order sought, and refuse to adjourn and re-hear the matter, the King's Bench will not compel them by mandamus to do so.

Semble, per Gibson, J., that the same principle applies to complaints under the Petty Sessions Act.

M. applied at the June Quarter Sessions, 1902, for a publican's licence in respect of his hotel. The Justices were equally divided upon the question, "Whether it seemed fit to them to hear the application at the then sessions?" The chairman thereupon directed an entry to be made in the Court-book—"This not being the annual licensing quarter sessions, it not seeming fit to the Court to grant the application, same is refused." The Bench declined to accede to the applicant's request to adjourn and re-hear the case. On motion to make absolute a conditional order for writs of *certiorari* and mandamus obtained by him:—

Held, that the Court of Quarter Sessions was not under a legal duty, enforceable by mandamus, to adjourn the matter of the application; that the entry in the Court-book was substantially good; and that the conditional order should be discharged.

R. (*Crowley*) v. *Justices of County Cork*; *R.* (*M'Intyre*) v. *Justices of Donegal* ([1902] 2 I. R. 252) distinguished.

CERTIORARI. This was a motion to make absolute a conditional order for writs of *certiorari* and mandamus obtained by the prosecutor, directed to the chairman and Justices of Tipperary. The applicant (Patrick Mulcahy) had, in 1900-1901, purchased certain premises known as the Glengall Arms Hotel, Cahir, at a sale under the Court of Chancery for a considerable sum, £1350. The premises had been formerly licensed, but the previous owner had allowed the licence to lapse. Owing to difficulties in making title, the applicant was (as he stated) unable to make application

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

for the necessary certificate at the annual licensing sessions in October, 1901. He applied accordingly at the June Quarter Sessions for a seven-day licence. The police opposed, as did also the solicitor for a neighbouring landowner, Lady Margaret Charteris. These objections were founded on three statutory grounds (3 & 4 Wm. 4. c. 68, s. 4).

The case was opened and witnesses were examined, and the chairman (as was deposed to by Lady Margaret Charteris' solicitor) put to the Bench the question "whether it did seem fit to them the Justices so assembled to hear the application for granting a new licence at the then sessions (see the Licensing Act, 1874, sec. 12). Upon this question seven Justices voted in favour of entertaining the application, and seven (of whom the chairman was one) against it. The applicant's solicitor then asked for a re-hearing or for an adjournment. This was refused by the chairman after consideration, and the following order was directed to be entered in the Court-book:—"Grounds of refusal—This not being the annual licensing quarter sessions, it not seeming fit to the Court to grant the application at this sessions, same is refused." Other topics, in regard to the evidence for and against the application, and the abstention from voting of certain of the Justices present, were raised, which, for the purpose of this report, and in regard to the decision of the Court, are immaterial. On behalf of Lady Margaret Charteris an affidavit had been filed as cause; and for the Crown notice had been served that application would be made to discharge the conditional order. The writ of mandamus sought was one "to enter continuances upon and to proceed to re-hear, and hear, and determine" the matters of the application. The grounds of cause mentioned (as to the *certiorari*) in the conditional order were as follows:—That said orders and adjudications in the premises were made without and in excess of jurisdiction; that the order in the premises was not an order of the Court of the majority of the presiding Justices; that the chairman wrongly rejected the vote of Mr. William O'Brien, one of the presiding Justices, who was qualified to vote; that the Court was improperly constituted.

Henry, K.C. (*Carrigan* with him), for the applicant, argued

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that there being an equal division, the Bench should have granted the certificate, citing *R.* (*Crowley*) v. *Justices of Cork* (1), and *R.* (*M'Intyre*) v. *Justices of Donegal* (1), or they should have adjourned and re-heard the case, citing *Reg.* v. *Ashplant* (2); *Ex parte Evans* (3); the Justices did *not* decide one way or the other. The order "refused" was wrong in substance, and should be quashed on *certiorari*; the Court should by mandamus compel the Justices to enter continuances, and re-hear and determine the case; they also cited *Reg.* (*Cusack*) v. *O'Connell* (4).

[GIBSON, J., referred to the cases collected in Stone's Justices (Ed. 1902), page 746.]

The Solicitor-General (*J. H. Campbell, K.C.*), and *C. Atkinson*, for the Crown, argued that in no such case had *certiorari* or mandamus ever been granted. In *Crowley's Case* (5) the *onus* was held to be on the objector, and the Justices were under an unqualified obligation to dispose of the cases before them at the annual licensing sessions (3 & 4 Wm. 4, c. 68, ss. 2, 4, 5). But here (under 37 & 38 Vict. c. 69, s. 12) there was an uncontrolled discretion in the Justices whether to entertain the application or not; and they did not "think fit" to *entertain* it. Thus the question whether they should *grant* the certificate or not did not arise, although the facts had of necessity to be opened in order to allow the Justices to exercise their discretion whether to entertain the application at all out of the ordinary course. Here in effect the Justices declined to hold that there were special circumstances sufficient to justify them in dealing with the application outside of the annual licensing (October) sessions. [Counsel also referred to *Kinnis* v. *Graves* (6); *Ex parte Evans* (3); *R.* v. *Wardle* (7).]

Jellett, K.C., and *Corvan* (for Lady Margaret Charteris), were also heard against the application. [They cited *Reg.* v. *Leicestershire Justices* (8).]

Carrigan, in reply.

Cur. adv. vult.

(1) [1902] 2 I. R. 252.
(2) 52 J. P. 474.
(3) 58 J. P. 260; [1894] A. C. 16.
(4) 20 L. R. Ir. 628.
(5) [1902] 2 I. R. 252.
(6) 67 L. J. Q. B. 583; 46 W. R. [480.
(7) 14 *Times* L. R. 424.
(8) 1 M. & S. 442.

LORD O'BRIEN, L. C. J. :—

In this case it appears that the prosecutor, Patrick Mulcahy, applied at the Quarter Sessions at Clonmel, held in June last, for a seven-day public-house licence. The magistrates were equally divided, seven being in favour of entertaining the application, and seven (including the chairman) being in favour of not entertaining it. His Honor the Chairman thereupon entered the ruling of the Bench as follows :—"This not being the annual licensing quarter sessions, it not seeming fit to the Court to grant the application at this sessions, the same is refused."

Putting aside the case of *Reg.* v. *Ashplant* (1), and the other case that counsel for the Crown, Mr. Atkinson, discovered, *Kinnis* v. *Graves* (2), and looking at what actually was done, independently of the form in which the order was made up, let us see what is the effect of what occurred. A vote was taken upon the question whether the Bench would entertain the application; the magistrates were equally divided; and they refused to adjourn. It is said they were bound to adjourn, and *Crowley's* and *M'Intyre's Cases* (3) were relied upon. In my opinion they are not in point in regard to the case before us, even if they be well decided. The decision there was upon another section of the Licensing Acts altogether—3 & 4 Wm. 4 c. 68, s. 4—providing that the Justices at a particular sessions *shall adjudicate upon* any objections, and upon section 5 of the same Act, which provides that "*upon each application being disposed of by the Justices attending at such sessions*," a certificate of the order is to be given to the person entitled thereto. My learned brethren, Andrews and Johnson, JJ., attached great weight to these words, and these words do not occur in the section with which we are now dealing. Of course, even if I held any doubt as to the correctness of their decision, I should loyally follow it, as I am bound to do; but we have to consider here a totally different section, namely, sect. 12 of the Act of 1874, which speaks of grants of licences at other than the annual licensing sessions "in such cases as may seem

(1) 52 J. P. 474. (2) 67 L. J Q. B. 583. (3) [1902] 2 I. R. 252.

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fit to such Justices." There is an absolute discretion vested in the magistrates by that section. The Justices were equally divided, and were not bound in law to adjourn the case, as was here contended. It is always competent for Justices to adjourn. It is in their discretion to do so; but if they refuse to adjourn we cannot compel them to do so—we cannot control their discretion.

As to the frame of the order before us, it is in my opinion good enough. The application—the applicant having failed to carry it—in my judgment automatically lapsed, and in substance stood refused, and therefore the entry made by the chairman was substantially correct.

GIBSON, J.:—

The only question argued before us in this case, arising on an application under section 12 of the Licensing Act of 1874, was the effect of the Court of Quarter Sessions having been equally divided. The argument was addressed to four points: 1. Was the Court under a legal duty to adjourn, which can be enforced by mandamus? 2. Was the order of refusal entered in the Court-book right? 3. If it was wrongly entered must *certiorari* and mandamus be granted? 4. Do *Crowley's* and *M'Intyre's Cases* (1) govern the present case?

1. What is the effect of an equal division in a Court? In the Superior Courts, in case of an appeal, such appeal fails, the judgment below stands, and the appeal is dismissed without costs: *Reg.* v. *Millis* (2); *Doe* v. *Suckermore* (3); Tidd's Practice (8th ed.), p. 1236. Where the proceeding is original, the application becomes abortive, and no judgment can be pronounced: Tidd, p. 963; *Reg.* v. *Archbishop of Canterbury* (4); and see the judgment of Barry, J., in *Reg.* v. *M'Mahon* (5). The inconvenience resulting from this introduced the practice of the junior Judge withdrawing his judgment, but this was not always done, and was never a matter

(1) [1902] 2 I. R. 252.
(2) 10 Cl. & F. 534.
(3) 5 A. & E. 793.
(4) 11 Q. B. 483.
(5) I. R. 9 C. L. at p. 372.

of right: *Reg.* v. *Archbishop of Canterbury* (1); *Thelwall* v. *Yelverton* (2); and see 1 Camp. 468.

In Courts of Summary Jurisdiction and at Quarter Sessions the difficulty was dealt with, not by the junior member of the Court withdrawing his vote, though this was sometimes done, as *Ex parte Evans* (3) shows, but by adjournment. This course, which was in many cases proper and usual, was in the discretion of the Court: *Kinnis* v. *Graves* (4); *Ex parte Evans* (3); and was a judicial act: *Dr. Tanner's Case* (5).

If in the exercise of their discretion the Justices did not see fit to adjourn, this Court could not, I think, interpose: *Ex parte Lewis* (6); *Reg.* v. *Justices of London* (7). If there was no adjournment, the summons or other proceeding, if original, dropped and became abortive; if an appeal, the order below stood: *Garton's Case* (8). In many cases an adjournment would be useless as a remedy for equal division (as in a prosecution under the Crimes Act, 1887) or inexpedient (as where there was a full Bench, and the effect of the adjournment would be that some of the Justices present would be unable to attend again, or where (as here) the adjournment would be to the next regular annual licensing sessions).

Counsel have been unable to refer to any book or authority (apart from *Crowley's* and *M'Intyre's Cases* (9)) that Justices who have honestly done their best to decide a case, and by whose disagreement an application automatically drops, can be compelled by the King's Bench to adjourn, or can be treated as if they had refused to hear and determine. The absence of precedent and authority is a strong argument as to the law not imposing any absolute duty to adjourn. It is the duty of Justices to hear an application, and to grant or dismiss it if they can agree; but *lex non cogit ad impossibilia*; they cannot be made to reassemble on the *chance* of their reconciling their differences. How often must the Court adjourn if they cannot agree?

(1) 11 Q. B. 483.
(2) 14 Ir. C. L. R. 188.
(3) 58 J. P. 260; [1894] A. C. 16.
(4) 67 L. J. Q. B. 583; 78 L. T. 502.
(5) Crimes Act Cases, 340.
(6) 21 Q. B. D. 191.
(7) [1895] 1 Q. B. 214.
(8) 57 J. P. 328.
(9) [1892] 2 I. R. 252.

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In the present case the application was to the discretion of the Court; and, if the licence had been granted, the confirmation by the annual licensing sessions would also have been discretionary: *Reg.* v. *Justices of Co Antrim* (1). Whether the Justices were right or wrong, they acted within their jurisdiction in disagreeing, and thereby allowing the application to drop in the absence of adjournment.

2. Was the order as entered in the Court-book right? If the Court, as the result of the division of opinion, decided to record what was done as a dismiss, their decision could not be impugned: *Reg.* v. *Justices of Monmouthshire* (2); *Ex parte Evans* (3). If the record was here made by the Court of Quarter Sessions or with their tacit assent, we cannot go behind it. *Rex* v. *Justices of Leicestershire* (4) is a very strong authority that, in a state of facts closely resembling those alleged here to exist, the King's Bench could not interfere. The case was apparently accepted as good law by Lord Herschell in *Ex parte Evans* (3); see also *Ex parte the Attorney-General* (5). Assuming, however, that the record can be treated as the unauthorized entry of one member of the Court or of an officer only, was it wrong? The case, there being no adjournment, came to an end, and the application was not granted.

Is the non-granting of a discretionary application equivalent to a refusal? The form "not granted, the Justices being equally divided," and "refused" are different more in form than in substance. *Reg.* v. *Ashplant* (6) seems to lay down that in case of equal division the summons may be dismissed. *Garton* v. *Justices of Southampton* (7) decides that in a case of equality of division on appeal the appeal may be recorded as refused. In *Kinnis* v. *Graves* (8) the Court, though they suggested that dismissal would not usually be an expedient course, did not question its legality. *Reg.* v. *Wardle* (9) conveys that there may be a distinction where the case is of a civil nature. No such distinction was suggested

(1) 4 L. R. Ir. 230.
(2) 4 B. & C. 844.
(3) [1894] A. C. 16, 20.
(4) 1 M. & S. 442.
(5) 41 J. P. 118.
(6) 52 J. P. 474.
(7) 57 J. P. 328.
(8) 67 L. J. Q. B. 583.
(9) 14 *Times* L. R. 424.

in *Garton's Case* (1); and I can see no substantial difference between the order in *Reg.* v. *Ashplant* (2) and any civil case proper. The point as to the exactly accurate form of record appears to me in principle (apart from decided cases) one of some difficulty. An application, however, which fails from the Bench being equally divided is automatically rejected by not being granted; and "refused," which may not be quite the same as "dismissed," substantially represents the result, even though a more appropriate form of entry might be devised. The application here was not a complaint under the Petty Sessions Act.

3. Supposing, however, that "refused" in the order was an inaccurate record, ought we allow *certiorari* or mandamus? I do not think that we ought to award mandamus unless the Court was compellable to adjourn. If the order on its face was, "The Court being equally divided, the application was by reason thereof refused," we would not, in my opinion, grant *certiorari* to quash or mandamus to erase the record, as in *Reg.* v. *West Riding Justices* (3). Here the record does not state the reason of refusal; but if the mandamus to adjourn, hear, and determine is impossible, we should not give *certiorari* merely on account of an inaccurate expression in the record, if it was inaccurate.

4. We must follow the previous decision of our own Court, whatever our own opinion might be, unless it can be distinguished. It has been distinguished on two grounds: 1, the defect there was on the face of the order; 2, the question there arose on an order at the annual licensing sessions, when there was (as the Court held) an absolute duty to dispose of the application by an affirmative adjudication on the objection. In *Crowley's Case* (4) the order was a speaking order, showing an equal division of the Justices, and it was held on its face bad, because it was the application that was rejected, and no statutory ground of objection was disclosed. In the other case the entry was, "Bench equally divided, no rule," that is, no rule on the application. The subject of the division was the objection. In both cases the Court held the orders were bad on their face. The substantial ground of the

(1) 57 J. P. 328.
(2) 52 J. P. 474.
(3) 5 Q. B. 1.
(4) [1902] 2 I. R. 252.

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decision was apparently that the section imperatively required an adjudication on the objection, and without such adjudication the application could not be disposed of as the statute required. If this was the ground of the decision, whether right or wrong, it does not seem necessarily to apply to such a case as the present; and I decline to extend the authority of *Crowley's Case* (1) to ordinary complaints under the Petty Sessions Act or discretionary applications. I know of no case holding that adjournment can be compelled as a result of equality of votes on the Bench, or that such a Bench can be treated as having refused to determine, and therefore subject to mandamus. The only legal consequence that necessarily flows in an ordinary case from such equality is that the application is spent and falls to the ground.

MADDEN and BOYD, JJ., concurred.

Solicitor for the applicant: *John O'Dwyer.*
Solicitor for the respondents: *Sir P. Coll.*
Solicitor for Lady Margaret Charteris: *W. Nolan.*

A. E. R. J.

(1) [1902] 2 I. R. 252.

In re FLORENCE PROCTOR, an Infant.

K. B. Div. 1902.

Habeas corpus—*Infant—Costs—Jurisdiction to order payment of costs to successful applicant—Supreme Court of Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *ss.* 53, 65.

June 19. Oct. 27.

Under section 53 of the Judicature (Ireland) Act, 1877, the Court, when granting an application for *habeas corpus*, has jurisdiction to order payment by the respondent of the costs of the application.

Habeas Corpus.

A conditional order for a writ of *habeas corpus* had been granted at the suit of Mrs. Dora Proctor to compel the respondents, the Rev. Thomas Murray and James Matthews and Mrs. Matthews, his wife, to give up the custody of the infant above named. The motion to make the order absolute came on for hearing on the 19th June, 1902, when the Court (Palles, C.B., and Johnson and Wright, JJ.) directed that the order should be made absolute. Counsel for the applicant asked for an order that the respondents should pay to the applicant the costs of the proceedings. The Court were of opinion that under the circumstances the case was not one in which costs should be withheld if there was jurisdiction to award them; but a doubt being suggested as to the existence of such jurisdiction, it was directed that the case should stand over upon this point.

Oct. 27.

The case now appeared in the list upon the question as to the jurisdiction to order costs to be paid to the applicant.

Serjeant Dodd and *J. Donaldson* appeared for the applicant; and *Ignatius J. O'Brien, K.C.*, for the respondent.

Palles, C.B., announced that the Court had considered the question, and had no doubt that, under sect. 53 of the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), they had jurisdiction

K. B. Div. 1902. *In re* Proctor.

to award costs to a successful applicant for *habeas corpus* (1). The respondents were accordingly ordered to pay the costs.

Solicitor for applicant: *W. R. Rogers.*
Solicitors for respondents: *Scallan & Co.*

A. E. R. J.

K. B. Div. 1902. Nov. 10, 17.

MILLER *v.* KIRWAN (2).

(1902. No. 4492.)

Practice—Action to recover possession on the title—Plea of possession—Interrogatories—Gen. Ord. XXX., Rule 11.

In an action to recover possession of land on the title, where the defence of possession is pleaded, the plaintiff is entitled to interrogate the defendant upon matters tending to support his own case, and is not deprived of that right merely because the discovery has the tendency or effect of disclosing the defendant's case.

Summons on the part of the plaintiff (adjourned into Court) that the defendant may be compelled to answer, or give further and better answers to, interrogatories. The action was to recover possession of premises in Abbeygate-street, Galway, and for mesne rates. The statement of claim alleged that by indenture dated May 17, 1882, the premises were demised to Robert Stephens for the term of ninety-one years from March 25, 1882. By deed dated January 16, 1890, Robert Stephens assigned the same premises to Anne Stephens for the residue of the term. Prior to and at the time of the death of Anne Stephens, which occurred on January 17, 1898, Elizabeth M. Kirwan, the defendant, was in

(1) See *Reg.* v. *Jones* ([1894] 2 Q. B. 383); and see sections 4 and 5 of the English Judicature Act, 1890 (53 & 54 Vict. c. 44). Section 65 of the Judicature (Ireland) Act, 1877, does not contain the proviso which is found in the English Judicature Act of 1890, section 4, that the existing practice and procedure "on the Crown side of the Queen's Bench Division" should remain unaltered.—[Rep.]

(2) Before Kenny, Barton, and Wright, JJ.

possession of the premises as tenant from year to year to Anne Stephens. John Stephens and Anne Frances Duncan, as personal representatives of Anne Stephens, by deed dated June 1, 1900, conveyed to John Thomas Miller, the plaintiff, the interest of Anne Stephens in the premises for the residue of the term. The statement of claim further alleged that the tenancy of the defendant was duly determined by notice to quit expiring on or before March 25, 1901.

The defendant pleaded possession, and traversed the service of the notice to quit.

A previous order for discovery had revealed the fact that the reversion expectant on the determination of the lease of May 17, 1882, had, by Landed Estates Court conveyance dated May 24, 1892, become vested in the defendant, who was now in possession of the lessor's counterpart of the lease upon which the plaintiff based his present claim to possession. A civil bill ejectment brought by the plaintiff against the defendant in respect of the same premises had been dismissed by Mr. Justice Andrews at the March Assizes of 1902.

The plaintiff delivered the following interrogatories to be answered by the defendant:—

1. Were you tenant from year to year of certain premises in Galway to the late Robert Stephens?

When did this tenancy commence? State the year and the time of the year when such tenancy commenced; also the yearly rent and gale days.

2. If you were tenant from year to year, as mentioned in the first interrogatory, were the premises of which you were such tenant part of the premises in the pleadings in this action mentioned? If such premises were not the premises in the pleadings mentioned, state what other premises you were such tenant as aforesaid of.

3. Did you subsequently become tenant of the premises in the pleadings mentioned to Anne Stephens, the wife or widow of the said Robert Stephens? Did you pay the rent payable by virtue of the contract of tenancy in the first interrogatory referred to to the said Anne Stephens? When did you first pay the said rent to the said Anne Stephens? Did you subsequently pay the said

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rent to John J. Stephens and Annie Frances Duncan, the personal representative of the said Anne Stephens, or either of them, or to any other person or persons on their behalf? State if you paid said rent to all or any, and which of the persons mentioned in the interrogatory.

4. If you paid said rent to any of the persons in the last interrogatory named or referred to, state how it was paid. State whether such payment was made directly, or by setting off any and what rent payable to you in respect of any and what premises in Galway, or how otherwise.

5. Are you the Elizabeth Mary Kirwan the grantee named in the Landed Estates Court conveyance, dated 1892, referred to in the first part of the first schedule to the affidavit of documents sworn by you in this action. If so, are the premises mentioned in the pleadings included in said grant?

6. Are the premises in the pleadings in this action mentioned included in the lease of the 17th May, 1882, referred to in the first part of the first schedule to your said affidavit? If not, state what premises are comprised in said lease. If the premises in the pleadings mentioned are included in said lease, state if you, or any predecessor in title of yours, have ever received the rent reserved by said lease from all or any one and which of the following persons, namely, (1) Robert Stephens; (2) Anne Stephens; (3) John J. Stephens; (4) Annie Frances Duncan; (5) the plaintiff. State if you received said rent from all, or any, and which of these persons directly, or by means of setting off any and what rent payable by you in respect of any and what premises, or how otherwise. If you did not receive the rent reserved by said lease from any of the above-named persons, did you receive it from any other person, or persons, acting on behalf of all, or some, or one of said persons? State from whom you received such rent.

7. Were you served with the notice to quit referred to in the first part of the first schedule of your said affidavit? If so, state when and the name of the person who served you with said notice.

The defendant is required to answer all the above interrogatories.

The defendant's answers were as follows:—

1. The said interrogatories are prolix and unreasonably wide, and unnecessary.

2. The said interrogatories seek to disclose matters relating solely to my title in the houses and premises sought to be recovered.

Fetherstonhaugh, K.C. (with him) *Richards*, for the plaintiff:—

The defendant should be compelled to answer these interrogatories. They relate to the plaintiff's title, and the answers will be useful to the plaintiff in support of his case. Where interrogatories fulfil this test, it makes no difference that the answers will disclose part of the defendant's case. If the interrogatories are relevant to the plaintiff's case, they cannot be said to relate exclusively to the defendant's case, which is the only event that would entitle the defendant to decline to answer. [The following cases were referred to:—*Lyell* v. *Kennedy* (1); *Combe* v. *Corporation of London* (2); *Attorney-General* v. *Emerson* (3); *Morris* v. *Edwards* (4); *Bewicke* v. *Graham* (5); *Marriott* v. *Chamberlain* (6); *Towne* v. *Cocks* (7); *Grattan* v. *Wall* (8); *Dickson* v. *Brady* (9).]

Henry, K.C., and *Pierce Nolan*, for the defendant:—

Lyell v. *Kennedy* (1) can be distinguished on the ground that in it there was no plea of possession. *Horton* v. *Bott* (10) is an authority in favour of the defendant, and it was cited with approval by Selborne, L.C., in *Lyell* v. *Kennedy* (1) at page 223. *Bleazby* v. *Bleazby* (11) was almost identical with the present case, and is binding on this Court. It is cited in Bray on Discovery at page 527 and in the Annual Practice. A defendant is entitled

(1) 8 A. C. 217.
(2) 1 Younge & Coll. 631.
(3) 10 Q. B. D. 191.
(4) 15 A. C. 309.
(5) 7 Q. B. D. 400.
(6) 17 Q. B. D. 154.
(7) L. R. 9 Ex. 45.
(8) Ir. R. 2 C. L. 80.
(9) Unreported. K. B. D., Ir., Dec. 1901.
(10) 2 H. & N. 249.
(11) 10 L. R. Ir. 60.

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until the trial of the action to maintain absolute secrecy as to the nature of his case, and to withhold every scrap of information which might anticipate his proofs. See judgment of Kenny, J., in *Coppinger* v. *Norton* (1). [They also cited *Attorney-General* v. *Gaskill* (2); *Horton* v. *Donnington* (3); *Danford* v. *M'Anulty* (4).]

Richards, in reply.

Nov. 17.

KENNY, J.:—

This action is one of ejectment on the title founded on notice to quit, and the plaintiff, having administered interrogatories, the defendant has declined to answer them on the ground that "they seek to disclose matters relating solely to my title to the houses and premises sought to be recovered." The question for our determination is as to the right of the plaintiff, having regard to the allegations in his statement of claim, to the discovery which he seeks.

The defendant has pleaded the statutory plea that he is in possession, which has the effect of putting the plaintiff on proof of his title. The plaintiff, in order to succeed at the trial, must do so on the strength of his own title, and the statutory plea has no greater force than to deny every material matter in the plaintiff's proofs, besides entitling the defendant to rely upon any independent defence other than an equitable one.

It is a well-established rule that a plaintiff in ejectment cannot obtain discovery of the defendant's title. The statement of the rule commonly assumes this form; but on the authorities there can be no doubt that it is far too general, and in its application must—if it be not qualified—lead to confusion. It seems to me as a general proposition to be quite as true to say that a plaintiff *can* get such discovery as to say that he *cannot*, for while he is undoubtedly entitled to discovery of all matters tending to

(1) [1902] 2 I. R. 232, at p. 245.
(2) 20 Ch. D. 519.
(3) 2 T. L. R. 739.
(4) 8 A. C. 456.

support his own case, he is not to be deprived of that right on the ground that the discovery may disclose the strength or weakness of the defence. If the interrogatory be one that can be said to relate merely to defendant's possible case—in other words, if it be a mere fishing inquiry, it would not be allowed. The same rule applies to all actions in which by proper defences a plaintiff is put on proof of the allegations on which he expects to succeed. Lord Bramwell expressly says so in *Lyell* v. *Kennedy* (1), and I think that the same conclusion is to be drawn from Lord Selborne's judgment in the same case. Indeed, for the purpose of our judgment on the present application, I do not think we need go outside of *Lyell* v. *Kennedy* (1). It was an action of ejectment, and the defendant traversed the allegations in the statement of claim, and pleaded the Statute of Limitations. The statement of claim set forth the plaintiff's title in detail, and alleged that the defendant had admitted that his—the defendant's—possession was only that of an agent or trustee for the plaintiff. Interrogatories were administered to defendant as to plaintiff's title and defendant's admission, a large number of which he declined to answer; and Lord Selborne, in holding that the interrogatories should be answered, adopted the rules as to discovery in such cases to be found in Sir James Wigram's work, and subsequently gives his clear opinion that "unless the whole matters inquired into by the interrogatories which the defendant has not answered are irrelevant to the plaintiff's case about to come on for trial, the defendant must make some sufficient answer to these matters."

Now, applying this statement of the law to the present case, is it not manifest that, with one or two exceptions, the interrogatories are most relevant to the plaintiff's case? The statement of claim sets out a lease of 1882, and various mesne assignments and acts by which the lessee's title became vested in the plaintiff, and then alleges a tenancy from year to year, created by one of the intermediate predecessors in title of the plaintiff, and which was alleged to have continued until it was determined by a notice to quit expiring on the 25th March, 1901. The interrogatories are, *inter alia*, directed to the creation of this yearly tenancy, its

(1) 8 A. C. at p. 230.

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continued existence, payment of rent under it, and, finally, the service of the notice to quit. They are all founded on averments in the statement of claim, every one of which is essential for the proof of the plaintiff's case. They *may* also be relevant to the defendant's case, should the latter, as usually happens, be mainly dependent on defects in the plaintiff's title—but the point is that they emphatically relate to the plaintiff's case. We therefore think that the matters inquired into by these interrogatories—taken as a whole—so far from not being merely "not irrelevant to the plaintiff's case," all tend most expressly to support it. As to *Bleazby* v. *Bleazby* (1), I need only say that the interrogatories in that case were not founded on any averments in the statement of claim, and appeared to relate to the defendant's title only. With regard to the allowance of interrogatories tending to support the plaintiff's case, a useful authority will be found in *Elliott* v. *Garrett* (2).

Although out of respect to the very full arguments which were addressed to us on this motion I have given the reasons which have led me to concur in the conclusion at which we have arrived, it would have been sufficient for us to have simply acted on the authority of the case of *Dickson* v. *Brady* (3), decided by this Court on the 3rd December, 1901, and brought to our notice by Mr. Richards. It was an action of ejectment on the title based on a notice to quit. There was a specially endorsed writ, and the statutory defence that the defendant was in possession. The writ merely alleged a yearly tenancy between plaintiff and defendant, and its determination by notice to quit. The plaintiff interrogated as to the existence of a yearly tenancy between the defendant and each of four parties other than the plaintiff who were named in the interrogatories, but to whom no reference whatever appeared in the pleadings—as to whether the contract was in writing, and when the tenancy commenced. The defendant put in no answer; but, in the interval between the service of the notice of motion and the hearing of it, made an affidavit in which he stated that he declined to answer the interrogatories on the

(1) 10 L. R. Ir. 60. (2) [1902] 1 K. B. 870.
(3) Unreported. K. B. Div. Ir. 1901.

grounds that they were irrelevant and fishing, and that the matters inquired into belonged to the case of the defendant, and not to that of the plaintiff. The Court—the members being the Lord Chief Justice and Mr. Justice Madden—decided that the defendant was bound to answer. It seems to me that the case before us is an *a fortiori* one to that.

We have gone critically through the interrogatories, and have struck out portions of Nos. 2 and 6 and the whole of No. 5 on the ground that they are irrelevant.

The defendant must pay the costs of the application.

BARTON, J.:—

This is an application on the part of the plaintiff under Order XXXI., Rule 11, that the defendant may be ordered to answer the interrogatories which have been delivered to him or to give such better or further answer as the Court may direct. The action is one of ejectment on title brought to recover possession of certain premises in Abbeygate-street in the town of Galway, alleged to be held by the defendant on a yearly tenancy which has been determined by notice to quit. It appears from the statement of claim that plaintiff claims as assignee of a lease, having purchased the lease from the administrators of one Anne Stephens, who was assignee of the original lessee Robert Stephens. The lease was dated the 17th May, 1882, and included other premises besides those sought to be recovered in this action. It was for a term of ninety-one years from 25th March, 1882, and accordingly is subsisting with nearly seventy years to run. To the statement of claim the defendant pleaded that she is in possession, and also pleads a traverse of the service of the notice to quit. The plaintiff before delivering these interrogatories had obtained an order for discovery of documents in obedience to which the defendant filed two affidavits of documents. From the documents disclosed therein it appears that the defendant represents the head interest in this very lease, having purchased the reversion expectant on the determination of the lease of 1882 by a Landed Estates Court conveyance dated March 24th, 1892, and being in possession of

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the lessor's counterpart of the lease of which plaintiff is the purchaser. It also appears that before bringing this action the plaintiff brought a civil bill ejectment in Galway County Court, and obtained a decree from the Recorder of Galway on the 28th October, 1901, which was reversed by Andrews, J., on appeal on March 21st, 1902, for some defect of proof. In the affidavit grounding the application for discovery of documents the plaintiff alleges that in these proceedings in the County Court the defendant refused to produce her receipts for rent and other documents. The plaintiff served the usual notice to admit facts, and the usual notice to admit the execution and service of documents. The defendant refused to admit any facts or the execution of any documents, even of the lease by which plaintiff holds these premises from her, the counterpart of which is in her possession. It is evident that the plaintiff having failed in the County Court, has come to this Court for the very purpose of availing himself of that machinery for discovery which is not available in the County Court. Here is a plaintiff, the purchaser of a subsisting lease, finding his landlord in possession. The suggestion is that the defendant has been in possession paying rent as yearly tenant by means of set off against head rent. At all events, defendant has refused and declined to make any admissions however reasonable. Under these circumstances plaintiff obtained leave to administer interrogatories, and on the 21st June last delivered the seven interrogatories the subject of this motion. The defendant, in reply, filed an affidavit refusing to answer any of them on several grounds, of which the only one now relied on is that they seek to disclose matters relating solely to the defendant's title. I concur with Mr. Justice Kenny in thinking that some of the questions are objectionable, as they relate solely to defendant's title, and do not tend to support plaintiff's title. I do not say that to some of the other questions or to parts of them objections may not be taken. But I am clearly of opinion that the answer is not sufficient, and that the other questions must be answered in substance, subject to any privilege against particular questions which the defendant may be entitled to claim.

In the first place, I agree with Mr. Fetherstonhaugh that the answer of the defendant, as it stands, is not a sufficient answer

in point of law. The defendant says that the questions seek to disclose matters which relate solely to her title. But that answer does not suffice. In order to be sufficient the answer ought to go on to say that the questions do not tend to prove or support the title of the plaintiff. It is not necessary to labour this point. It seems clear on the authorities (see *Emerson* v. *Ind Coope and Co.* (1); *Morris* v. *Edwards* (2)). This, however, is not the real point at issue on this summons. The addition of a few words would amend this defect. The real question would still remain. In an action of ejectment on title alleging a tenancy from year to year, and the determination of that tenancy by notice to quit, in which the defendant pleads a plea of possession, under Order XXI., Rule 21, can the plaintiff interrogate the defendant, as he has done in this case, with reference to the alleged tenancy and as to the service of the notice to quit? That is the real question, and I shall give my reasons for thinking that such interrogatories are allowable and must be answered. For this purpose I shall refer briefly to the English and Irish authorities.

The only English cases to which it is necessary to refer are *Horton* v. *Bott* (3) and *Lyell* v. *Kennedy* (4). *Horton* v. *Bott* (3) was a case in which an heir-at-law claimed possession in ejectment from a person deriving title by conveyance from one of plaintiff's ancestors. The Court refused to allow interrogatories as to the settlement under which defendant derived title—a matter exclusively relating to defendant's title and not relevant to plaintiff's title. In the same way we are for a like reason refusing, in the present case, to allow interrogatories as to the Landed Estates Court conveyance under which defendant derives title. In *Lyell* v. *Kennedy* (4) the plaintiff was assignee by deed of the co-heiresses of a deceased intestate owner in fee—one Annie Duncan. The statement of claim alleged that the defendant was in possession in a fiduciary capacity for the deceased intestate and her heirs. The statement of defence did not admit the allegations in the statement of claim, and contained a

(1) 33 Ch. D. 323, 329.
(2) 15 App. Cas. 309.
(3) 2 H. & N. 249.
(4) 8 App. Cas. 217.

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plea of the Statute of Limitations. The plaintiff administered interrogatories as to matters relevant to the pedigree, which was part of his case, and as to the alleged admissions of the defendant that his possession was of a fiduciary character. The Court of Appeal (1) refused to compel answers to the interrogatories on the authority of *Horton* v. *Bott* (2). The House of Lords (3) reversed this judgment. Their Lordships distinguished *Horton* v. *Bott* (2), and decided in effect that as regards a plaintiff's right to administer interrogatories there is really no difference between actions of ejectment and other actions, and that a plaintiff may interrogate defendant in ejectment on the title on all matters relevant to the plaintiff's title, or, in other words, may put all such questions as might be put to the defendant in direct examination if called as a witness at the trial. Of course (as Mr. Henry pointed out) interrogatories on such subjects must not be confounded with, or degenerate into, cross-examination. I shall merely quote two passages—one from the judgment of Lord Selborne and the other from the judgment of Lord FitzGerald. At p. 227 Lord Selborne pointed out that "unless the whole matters inquired into by the interrogatories, which the defendant has not answered, are irrelevant to the plaintiff's case about to come on for trial the defendant must make sufficient answer to those matters." Lord FitzGerald said at p. 253—"The plaintiff does not contest this maxim (*i.e.* that he must succeed on the strength of his own title) or seek to escape from it. He admits that he must prove his title, and can only succeed on a proved title. He claims to be permitted to prove that title. He seeks to do so now by examination of the defendant as to his (plaintiff's) title, just as he would be entitled to call defendant as a witness at the trial, and examine him as to the pedigree on which plaintiff relies, or any other step in his title on which defendant may be a competent witness. The contention of the defendant, on the other hand, seems to be inconsistent. . . . There is nothing in the maxim, and there is nothing in public policy or in the policy of the law which deprives the plaintiff of the ordinary right of proving his own title by the lips of the defendant." It seems to

(1) 20 Ch. D. 484. (2) 2 H. & N. 249. (3) 8 App. Cas. 217.

me that this decision of the House of Lords is a clear authority for the plaintiff on this summons.

It was suggested on the authority of *Bleazby* v. *Bleazby* (1) that there is some difference in the Irish practice. That case may have led to some misapprehension on the subject, but I propose to refer to some Irish cases which show that there is really no difference of practice in the two countries. The first two cases to which I shall refer were not actions of ejectment, but, as I have pointed out, there is no real difference in principle between interrogatories in ejectments and in other actions, and they are useful cases of a kindred kind. *Grattan* v. *Wall* (2) was an action for rent by assignees of a reversion charging the defendants as assignees of the lease. The interrogatories related to certain alleged deeds of assignment of the lessee's interest. I refer to the case for the purpose of pointing out that counsel for defendant in the course of his argument said—"The real test is this—if the plaintiff brought the defendant here on a *subpœna duces tecum* would the Court require him to produce these deeds?" Fitz Gerald, B., said:—"Of course they would, if the issues were whether the assignment existed, and a witness said, 'I have the deeds and will not produce them.'" The Court allowed the interrogatories. The next Irish case to which I wish to refer is *Acheson* v. *Henry* (3). It was an action for trespass to a fishery, and the interrogatories were practically directed to proving out of the mouth of the defendant all the alleged trespasses by asking him whether he or any person authorized by him had committed the trespasses complained of. The Court was at first inclined to reject the interrogatories; but after full argument they were sustained on the ground that interrogatories were for the purpose of "facilitating proof and abridging expenditure," and that these particular interrogatories were relevant to and supported the case of plaintiff. The next Irish case was *Read* v. *M'Jennett* (4). It was an action of ejectment for overholding on the expiration of a lease for three lives. The point in dispute was whether one of the lives in the lease had died. The

(1) 10 L. R. Ir. 60.
(2) I. R. 2 C. L. 80.
(3) I. R. 5 C. L. 496.
(4) I. R. 6 C. L. 267.

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Court of Queen's Bench allowed an interrogatory as to the death of the *cestui que vie* and also as to the reputation of the family on the subject. The Court treated it as "a clear case" in which the plaintiff was seeking evidence from the defendant as to a step in his (plaintiff's) title, just as plaintiff in the present case is seeking evidence of steps in his title, namely, the tenancy and the determination of it, which are essential to his right to recover. The next Irish case is *The Bishop of Cork* v. *Porter* (1). It was an ejectment on title to recover possession of certain lands upon the allegation of a forfeiture by reason of the breach of a covenant against assigning or subletting. The plaintiff moved for liberty to administer certain interrogatories, the object of which was to facilitate proof of the allegation that the lease had been forfeited. Palles, C.B., delivered the judgment of the Court, disallowing the interrogatories on the authority of *Pye* v. *Butterfield* (2). That decision stands on a settled principle of the law of evidence which is part of the general rule against criminating questions, that a party cannot be compelled to answer any questions which would expose him to a penalty or forfeiture. The decision is entirely consistent with the proposition that a witness may be asked any question on interrogatories which he might be compellable to answer if called as a witness at the trial, because he would not be compellable at the trial to give an answer to a question which would expose him to a forfeiture. The next Irish case is *Bleazby* v. *Bleazby* (3)—a decision of a single Judge at Chambers, which has, I think, been somewhat misunderstood. It was an action by an administratrix of a lessee against the son of the lessee who was in possession. The interrogatories were delivered under the then rules, with the statement of claim, which was of a very bare character. It did not, as the statement of claim in the present case does, allege a tenancy from year to year and its determination as part of the plaintiff's title. There were no special circumstances in the case, and there was nothing to indicate that the questions were relevant to plaintiff's title. It seems to me that in that case the learned Judge refused in the absence of an affidavit to compel an answer to fishing interrogatories which did not appear to tend to support the

(1) I. R. 11 C. L. 94. (2) 1 B. & S. 827. (3) 10 L. R. Ir. 60.

plaintiff's title. I do not think that that case conflicts with our decision; but if it does, we feel bound to follow a later decision of this Division which is binding on us. I refer to the case of *Dickson* v. *Brady*, decided by the Lord Chief Justice and Madden, J., in December, 1901. It is unreported, but we have sent for the papers and orders. It was an ejectment on title against a yearly tenant on a notice to quit, as this action is. There was a simple defence of possession; the statement of claim was not nearly so precise and full as the statement of claim in the present case. There were none of the special circumstances which attach to this case. The defendant refused to answer interrogatories which were to the same effect as those in this case, upon ground more sufficient in point of technicality than the answer in this case, and the Court ordered the interrogatories to be answered. We are bound by that decision, and if there were nothing more in the law and the authorities that case would be sufficient for us. However, as that case was unreported, and as this question has been so fully and strenuously argued before us, we have thought it right to discuss the whole subject fully.

There are one or two observations which I should like to add arising out of the argument, with reference to the effect of the plea of possession. Our present decision is entirely consistent with our recent decision in *Coppinger* v. *Norton* (1). That was a pleading motion in which we held that, in an ejectment on the title where the defendant simply pleads the plea of possession under Order XXI., Rule 21, the plaintiff cannot deprive the defendant of the protection of that rule by pleading a special reply and forcing the defendant to join issue on it or to rejoin specially. My judgment in that case, to which I adhere, followed the words of Lord FitzGerald in *Danford* v. *M'Anulty* (2), where that learned Lord pointed out that in ejectment on title, where the plea of possession is pleaded, there is no pleading after the statement of claim, and the plaintiff must join issue on the defence of possession, and cannot reply specially to it. That case dealt with the rule of pleading. The present case deals with the rule as to interrogatories, and is supported by the judgment of

(1) [1902] 2 I. R. 232. (2) 8 App. Cas. 456.

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Lord Fitz Gerald in *Lyell* v. *Kennedy* (1), decided in the same year, and reported in the same volume of the Appeal cases. It was suggested during the argument by Mr. Nolan that to allow interrogatories of this kind would deprive defendants in ejectment of the protection which Order XXI., Rule 21, was intended to give them, and render that rule nugatory. The answer to that suggestion seems to me to be that the Rule was not intended to curtail the plaintiff's rights as to proving his case, or to prevent the plaintiff calling the defendant as a witness on his behalf at the trial, or interrogating him before the trial, if he (the defendant) can give evidence in support of plaintiff's case. The plea of possession may make a difference, and may give an advantage indirectly to the defendant, even as regards interrogatories, as is pointed out in the practice books, *e.g.* Daniell's Chancery Practice, 7th edition, vol. 2, p. 1538, where it is stated that "a defendant pleading a plea that he is in possession is not bound to give any discovery relating to his own title, for his case is not that he has a title, but that the plaintiff has no title." For example, if, in a case like the present, the defendant had pleaded specially a number of pleas, the plaintiff might be able, in accordance with the general rule as to interrogatories, to interrogate him as to the facts on which he relies in support of those pleas. But where the defendant shelters himself behind the plea of possession, the plaintiff cannot interrogate him as to the facts constituting his case, unless they also tend to prove his (the plaintiff's) case. This view of the matter places, I think, the protection of a defendant pleading possession in ejectment on its true basis. The defendant need not disclose his own case, *i.e.* what is exclusively his own case, either by plea or proof, until the plaintiff has made his case. The plaintiff must succeed on the strength of his own title. But if the defendant can give any evidence relevant to the plaintiff's case, the plaintiff can call him as a witness at the trial or interrogate him before the trial as to such matters.

There is another point to which I wish to refer. The Court will in all cases take care to protect the defendant from

(1) 8 App. Cas. 217.

fishing interrogatories, and ejectments are a class of action in which fishing interrogatories are specially objectionable, and are always closely scrutinised. In the present case I was at first inclined to look upon these interrogatories as of a fishing character. But the very special circumstances disclosed by the documents are quite sufficient, in my opinion, to remove that suspicion. For all these reasons I think that these interrogatories, subject to the qualifications laid down by Mr. Justice Kenny, and subject also to any privilege against particular questions which the defendant may be entitled to claim, must be answered in substance by the defendant.

WRIGHT, J., concurred.

Solicitor for the plaintiff: *Henry Concannon.*
Solicitors for the defendant: *T. F. O'Connell & Son.*

J. L.

SPROULE *v.* HOPKINS (1).

Nullity of marriage—Divorce—Domicil of respondent—Act on petition—Jurisdiction.

The Court has jurisdiction, in a suit for a decree of nullity of marriage, to determine the validity of a marriage contracted in Ireland, irrespective of any question as to the respondent's domicil or place of residence.

In a suit for a divorce *a mensa et thoro*, in order to give the Court jurisdiction, it must be shown either that the respondent's domicil was Irish when the suit was instituted, or that he had a sufficient residence in Ireland to give the Court jurisdiction to grant such relief.

A petition was presented for a decree of nullity of marriage on the ground of the previous marriage of the respondent with a wife still alive; and in the alternative, for a divorce *a mensa et thoro* on the ground of adultery and cruelty. The so-called marriage took place in Ireland, where the petitioner was domiciled and resided. The respondent, who was originally domiciled in Ireland, was served with the citation in England, and filed an act on petition, objecting to the jurisdiction of the Court on the ground that he was domiciled and resident in England.

The Court, on the evidence, held that the respondent had abandoned his

(1) Before ANDREWS, J.

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English domicil, and reverted to his Irish domicil of origin, and that his domicil was Irish both at the time of the marriage with the petitioner, and at the commencement of the suit, and overruled the act on petition.

TRIAL OF ACT ON PETITION.

This case came before the Court for trial of the act on petition filed by the respondent. The suit was brought for a declaration of nullity of marriage, or in the alternative, for a divorce *a mensa et thoro* on the ground of cruelty and adultery. The act on petition set out, after stating what the petition was for, that the domicil of origin of John Keppel Hopkins was in Ireland, but that he had lost his domicil of origin and acquired an English domicil, as he left Ireland nineteen years ago without any intention of returning thereto, and resided in London, which he had made his permanent residence. He followed journalistic employment in London, where he furnished chambers, and was placed on the parliamentary and municipal voters' lists. From that time to the present he had had permanent employment as a journalist. At the time the respondent contracted the marriage referred to in the petition, November, 1899, he had left London temporarily, by direction of his medical adviser, and had gone to Bray, and after the marriage the respondent and petitioner returned to London and went to Paris. Subsequently they came back again to London, where they remained for about a month, and again came to Ireland. The respondent's permanent headquarters were, and had been for the last nineteen years, in London, and he had no intention of returning to Ireland. An answer was filed to the act on petition; it denied that the respondent had ever lost or abandoned his domicil of origin, or that he ever had a permanent home or property in England. When he came to Ireland, in the year 1899, he had no employment in England or business there. Prior to the marriage the petitioner had a house at Bray, where she still resided, and it had been arranged that that was to be their permanent home. Subsequent to the marriage tour they returned to Bray, and resided there down to the end of the year 1900; and she submitted that if he had at any time acquired an English domicil he had abandoned it prior to the marriage, and his domicil of origin had revived. The respondent filed a reply traversing the matters alleged in the answer.

The trial of the act on petition was set down for hearing before Andrews, J., without a jury. The evidence given, and the arguments of counsel, sufficiently appear from the judgment.

H. D. Conner, K.C., and *Jefferson*, for the respondent.

Samuels, K.C., and *Dunn*, for the petitioner.

[The following authorities were cited:—*Simonin* v. *Mallac* (1); *Armytage* v. *Armytage* (2); *Niboyet* v. *Niboyet* (3); *Le Mesurier* v. *Le Mesurier* (4); *Sottomayer* v. *De Barros* (5); *Williams* v. *Dormer* (6); *Chichester* v. *Donegal* (7); *Johnson* v. *Cooke* (8); Shelford on Marriage, pp. 4, 6; Westlake's Private International Law, par. 45.]

ANDREWS, J.:— May 13.

By her petition in this suit, which was commenced in September, 1901, the petitioner prayed that the ceremony of marriage between her and the respondent, performed at Bray, in the county of Wicklow, on the 1st of November, 1899, should be declared null and void on the ground that the respondent, as she alleged, was previously married to a wife then still living, and in the alternative, for a divorce from the respondent *a mensa et thoro* on the grounds of his alleged adultery and cruelty.

The respondent, upon whom the citation was served in England, appeared under protest, and filed an act on petition praying that this suit should be dismissed with costs, his contention being that his Irish domicil of origin had been lost by his acquisition of an English domicil of choice long prior to November, 1899, and that his acquired domicil had thenceforth continued unchanged. The act on petition, by which the jurisdiction of this Court to hear the petition was objected to, was heard by me on the 6th instant, the hearing having been delayed on account of the respondent's illness; and the respondent, Mr. Henry Campbell, and Mr. John

(1) 2 Sw. & T. 67.
(2) [1898] P. 178.
(3) 4 P. D. 1.
(4) [1895] A. C. 557.
(5) 5 P. D. 94.
(6) 2 Robert. 505.
(7) 1 Add. 19.
(8) [1898] 2 I. R. 130.

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C. Rooney were orally examined on behalf of the respondent, and the petitioner was orally examined on her own behalf.

As regards so much of the petition as seeks a declaration of nullity, I am of opinion that this Court has jurisdiction to hear and determine the question of the validity or invalidity of the marriage contracted between the parties in Ireland irrespective of any question as to the respondent's domicil or place of residence. In the case of *Simonin* v. *Mallac* (1), which was heard before the full Court for divorce and matrimonial cases in England in 1860, the petitioner and respondent being native subjects of France and domiciled there, came to London, and were married there by license in conformity with English law, but not in accordance with what the law of France required in such a case. In about two days they returned to France, where the petitioner subsequently obtained a decree of nullity in the French Courts, and afterwards came to England, and petitioned for a decree of nullity in the English Courts. The citation was served on the respondent in Naples. He did not appear, and two questions arose for decision: first, whether the English Court had any jurisdiction over the respondent; and, secondly, if it had, whether, according to English law, the marriage was to be held null and void. The Court in a very learned and well-considered judgment, delivered by the Judge Ordinary, Sir Creswell Creswell, decided that it was competent to entertain the suit and adjudicate upon the petition, and that, so far as English law was concerned, the marriage was valid, notwithstanding the result that the petitioner was held to be a wife in England, and not so in France. The Court decided that the respondent, having entered into a contract in England, was subject to the jurisdiction of the English Court in respect of the personal *status* existing from such contract, and that there was nothing contrary to natural justice in calling upon the respondent to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where he entered into it. The subsequent case of *Sottomayor* v. *De Barros* (2), commenced in 1876, was heard and decided in England before Sir Robert Phillimore, and afterwards in the

(1) 2 Sw. & Tr. 67. (2) 2 P. D. 81; 3 P. D. 1; 5 P. D. 94.

Court of Appeal, where the petitioner and respondent, who were Portuguese subjects, were dealt with as being domiciled and resident in Portugal. It also was a suit for a declaration of nullity of marriage, and the respondent was served with the petition in Portugal. He entered an appearance to the citation, but did not file an answer nor appear at the hearing. The report does not disclose whether the appearance he entered was under protest. I doubt whether an appearance not under protest would alone be sufficient to entitle a Court to assume jurisdiction if the disclosed facts showed it had none, but counsel was heard for the petitioner only. It was not suggested by any one that the Court had not jurisdiction to hear or determine the suit. *Simonin* v. *Mallac* (1) was referred to, and no one questioned the decision as to jurisdiction in that case, which, in my opinion, applies to the present case; and I hold that the contract of marriage having been entered into and the marriage celebrated in Ireland, this Court is competent to hear and decide the question in this suit of the validity of the marriage on the ground of its having been, as alleged, a bigamous marriage on the part of the respondent, irrespective of any question of domicil or residence.

Then as regards so much of the petition as seeks for a divorce *a mensa et thoro*, in order to give this Court jurisdiction, it should be shown either that the respondent's domicil was Irish, when the suit was instituted, or that he had a sufficient residence in Ireland to give this Court jurisdiction to grant such relief.

His domicil of origin was admittedly Irish, but, though it may be open to some question, I am of opinion upon the evidence that he lost his Irish, and acquired an English domicil. Although he had no permanent fixed residence in London, and lived in different apartments there, I think that the proper inference from the facts of his having selected London as the place to earn his livelihood in, of his lengthened residence there, and of the character of the employment he obtained, and might naturally expect to continue to obtain there, and the circumstances of his Irish relatives, is that he voluntarily abandoned his Irish domicil of origin and settled in London *animo manendi*, if not absolutely

(1) 2 Sw. & Tr. 67.

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permanently, at least for an indefinite and unlimited time, and without any then existing intention of returning to reside in Ireland.

The question then arises, had he, when he married in November, 1899, abandoned his acquired domicil of choice, and resumed his Irish domicil of origin, or was that domicil then revived.

It has been considered that the evidence to establish the abandonment of an acquired domicil and the resumption of a domicil of origin need not be so strong as the evidence which is requisite to establish the abandonment of a domicil of origin, and the acquisition of a new one: *Lord* v. *Colvin* (1). On the abandonment of the domicil of choice the domicil of origin may be revived without the actual acquisition of another domicil, for no person can, according to our law, be at any time without a domicil; but the abandonment of a domicil of choice may of course be accompanied by an actual resumption of a domicil of origin. To effect a change of domicil there must be a combination of intention and conduct, and intention may be and often is best inferred from conduct and acts.

It appears from the evidence that after some years of journalistic employment in Dublin the respondent went to London, and after a long residence there, where he had a variety of journalistic engagements, he got a severe attack of pneumonia towards the end of 1898, and was advised to give up work and go to the seaside. He was then living in a flat in London, in which he had his own furniture, which he left with a gentleman who resided with him more or less as a security for money which he owed him, and in the end of 1898 he came to Ireland on a return ticket, and stayed for some time at a hotel in Dublin, and afterwards at the house of his friend, Mr. Campbell, at Shankill, near Bray, where, with the exception of some visits to Newry, he remained until August, 1899, before which time he would appear to have recovered his health. While at Shankill he made the acquaintance of the petitioner, whom he knew to have private means. He had practically none. She had taken Herbert Villa, a furnished house at Bray, after he came to Ireland. When he

(1) 28 L. J. Ch. 361.

left Shankill he went to Ivy Lodge, Loughlinstown, where he remained till about the end of October, and, being engaged to be married to the petitioner, the marriage was celebrated at Christ Church, Bray, on the 1st November, 1899. They then went on a wedding tour abroad, on which he used the return half of his ticket to London. After the wedding tour, they returned to the petitioner's house at Bray. He appears to have gone afterwards to Paris to see a gentleman on business, after which he returned to the petitioner's house. In about a fortnight what he described as "the trouble" arose between them. The petitioner left the house in consequence, and he remained there for some time, until she had him turned out. He then went to an hotel, and some time afterwards endeavoured to resume residence in her house, which he re-entered by force, and was again expelled, notwithstanding which he still remained in the neighbourhood. In his evidence he said he did so to defend his character, and that efforts were made for a reconciliation. He said he was engaged in writing a guide book to the United Kingdom for Americans, in which he was assisted by his brother, who had come from America, and they travelled about a good deal to obtain information. He returned after his journeys to Dublin, where he stayed at different places, and during part of the time he got some journalistic work there. This course of life continued until his return to London, in or about June, 1901, which appears to have been only a temporary return, although he got some employment then from the Press Corporation, for whom he had previously done work. There is no satisfactory evidence that his return to London was for the purpose or with the intention of again settling there. His intention appears to have been to go to America to see after the publication of his book. His letter to the petitioner from London, dated June, 1901, refers to his brother and himself returning to the States, where he wrote they would be as happy as sand boys when his sister came out to join them. Other letters refer to his intention of going to America (where he did not, however, go), and indicate that he had no intention of settling again in London. In February, 1901, he was before the magistrates on a summons obtained by the petitioner, and he told the magistrates that he was going to America, and he said in his evidence that but for

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these proceedings he would be there now. He added that his intention to go there was with reference to bringing out his book, but the relevance of it is in relation to the question whether his return to London was with the intention of settling there. The petitioner in her evidence stated that the arrangement and understanding between them was that after the marriage they were to live at her house at Bray (which is consistent with probability); that he never talked about going back to London, and had no idea of going anywhere but to Herbert Villa; and that from the time he came to her till she put him out he never did a day's work. His evidence as to his intention of returning to London does not appear to me to be consistent with his acts and conduct after he became engaged to be married to the petitioner, and upon the entire of the evidence, which I have only briefly referred to, but all of which I have considered, I entertain no doubt that the respondent abandoned his English domicil, and reverted to his Irish domicil of origin, and that his domicil was Irish, both at the time of his marriage and when this suit was commenced; and, whether the marriage was valid or invalid, the petitioner's domicil was also Irish.

I therefore am of opinion that this Court has jurisdiction to hear and determine the whole of the petition; and I must order that the respondent's act on petition be overruled, and that the respondent do forthwith enter an absolute appearance to the petition, and do file an answer thereto on the merits within fourteen days from this date, and in default thereof, that the petitioner be at liberty to proceed with her petition, and adduce evidence of the allegations contained therein, and that her costs of the respondent's act on petition, and the hearing and determination thereof up to and including this day, be part of her costs in the cause, and that her solicitor do pay the shorthand writer's proper charges for taking down the evidence at the hearing of the act on petition, and do have such payment as part of the petitioner's costs in this cause.

Solicitors for the respondent: *Carlyle & Duncan.*
Solicitors for the petitioner: *Hanmore & Co*

W. L.

THE KING (FERGUSON) *v.* MORE O'FERRALL (1).

Appeal.
1901.
Dec. 6, 7.

Poor Law—Guardians—Accounts, audit of—Local Government Board auditor —Duties and powers of—10 *Vict. c.* 31, *s.* 1.

A Local Government Board auditor, when auditing the accounts of a board of guardians, being dissatisfied as to the legality of the payment of a sum of money granted by the guardians as outdoor relief to a widow, aged fifty-four, on the ground that she was permanently incapacitated for work, called for a medical certificate, or other evidence, to show that she was unable to work. The guardians had acted on the statement of their relieving officer, in making the allowance, and declined to give further evidence. The auditor surcharged them with the payment. On an application by the guardians for a writ of *certiorari* to quash the surcharge by the auditor:—

Held (affirming the decision of the King's Bench), that it was within the powers of the auditor, and that it was his duty, to call for further evidence in the case, and such evidence not having been given, that the surcharge was right.

APPEAL from an order of the King's Bench Division, dated the 14th June, 1901, refusing to make absolute a conditional order for a writ of *certiorari* to quash an order of Mr. More O'Ferrall, Local Government Board Auditor, surcharging the Guardians of the Antrim Union with a sum of 28*s.*, the amount granted by the Board as outdoor relief to a woman named Jane Weir, a widow, on the ground that she was incapacitated for work.

It appeared from the affidavit of Thomas Ferguson, the Chairman of the Board of Guardians, that on the 30th November, 1899, an application was made by the relieving officer for outdoor relief on behalf of Jane Weir, and the application was adjourned for inquiries. At a subsequent meeting of the Board held on the 28th December, 1899, the Board, after hearing the result of the inquiries made, and what the relieving officer and the Guardians of the district in which Jane Weir had lived had to say about the case, came to the conclusion that she was destitute, and that owing to permanent debility she was unable to labour and earn

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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her living, and granted her 2*s.* a-week outdoor relief up till the 31st March, 1900. Thomas Ferguson, as chairman of the Board, initialled the Report Book.

On the 13th December, 1900, J. More O'Ferrall attended at the Antrim Workhouse to audit the accounts of the Antrim Union for the two half-years ending respectively the 30th September, 1899, and the 31st March, 1900. In auditing the accounts he found the following entry:—"Jane Weir; aged 54; widow; servant; general debility," the last-mentioned words being in the column headed: "If permanently disabled, state by what defect, bodily or mental, and nature of disability—as 'Old age,' 'Crippled,' 'Idiot,' etc." Not being satisfied on the entry that Jane Weir was a proper subject for outdoor relief, the auditor questioned Richard Craig, the relieving officer, about the case. The auditor did not consider Craig's replies satisfactory, as he could not state that Jane Weir was incapacitated for work by reason of either mental or bodily infirmity. The auditor stated to him that he did not consider that the fact of her being aged 54 was *prima facie* evidence of her being incapacitated by reason of old age, and he surcharged Thomas Ferguson with the amount, 28*s.* The auditor stated to Craig that if a medical certificate were produced to him, certifying that Jane Weir was unable to earn her living, he would pass the payment; but if that were not produced he would be obliged to let the surcharge remain; that he would be obliged to close his audit on the following Monday; and he would give them from that day (Thursday) till the following Monday for the production of a medical certificate.

No further proof of incapacity to work on the part of Jane Weir was produced. In March, 1901, a summons was issued at Petty Sessions against Ferguson for recovery of the 28*s.*; and the case was adjourned to allow an application for *certiorari* to be made to the King's Bench. In April, 1901, Ferguson wrote to the auditor, asking him, in pursuance of section 12 of the Local Government Act of 1871, to state in writing the reasons for the surcharge; and on the 20th April the auditor replied: "My reason for making this surcharge was that there was no evidence produced to me to show that Jane Weir was incapacitated for labour by reason of old age or of mental or bodily infirmity."

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On the 9th May, 1901, a conditional order for *certiorari* to quash the order of surcharge by the auditor was obtained from the King's Bench. On the 14th June, 1902, the Court allowed the cause shown, and discharged the conditional order. From that judgment the guardians appealed.

The Macdermot, K.C., and *R. F. Todd*, for the appellants.

S. L. Brown, K.C., and *Pierce Nolan*, for the respondent.

FITZ GIBBON, L. J. :—

Dec. 7.

When we see what the question at issue really is, we are agreed as to the order which we should make.

The affidavit of Thomas Ferguson, who is complaining of the surcharge, states :—"I am informed by the relieving officer and believe that no evidence was produced before the auditor that Jane Weir was not a fit person to receive outdoor relief," and he refers to the affidavit of the relieving officer. No doubt the affidavit of the relieving officer deposes to statements which he made to the auditor, and that officer, having visited Jane Weir, may have been in a position to give legal and sufficient evidence that she was a fit object of outdoor relief. Speaking for myself, I think that the Court has power, even on *certiorari*, to consider whether a judgment of the auditor upon a question of fact contrary to the judgment of the Guardians upon the same question is or is not a right one ; but, in coming to a conclusion, the Court, and I believe the auditor also, should and would be content to accept as sufficient any reasonable evidence given to the Guardians in any particular case, provided there was nothing in the mode in which it was given, or in the circumstances of the case, which called for further investigation.

But the real question which brought the parties into the King's Bench, rather than go before the Local Government Board, was one of principle. An issue of law was raised between the auditor and the Guardians, namely, whether the auditor had any power to call for evidence to sustain the judgment which was pronounced by the Guardians upon a report of the relieving officer in the prescribed form. That issue goes to the root of the auditor's authority, and if decided, as an abstract and general principle, in the negative, it would make the audit almost formal.

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Fitz Gibbon, L.J.

In my opinion the duty of an auditor includes the task of satisfying himself of the legality of every payment claimed, and as a condition of performing that duty he must be entitled to satisfy himself of the existence of the state of facts which is necessary to make the payment legal. In the case before us the fundamental fact, the existence of which was a condition precedent to the legality of granting outdoor relief to Jane Weir, was her permanent incapacity to work.

She was stated to be fifty-four years of age, but as to her "permanent incapacity" nothing more appeared than "general debility"; that is, she was a generally weak woman, aged fifty-four. Many women of that age, and even older, though weak, are perfectly capable of doing some work, and many are capable of doing enough work to maintain themselves. Taking the very meagre description of her alleged infirmity in connexion with the statement of her age, no one can deny that the auditor was within his right in asking for further evidence of her permanent incapacity to work if he had jurisdiction to ask for any evidence at all. That is the point on which the Guardians joined issue with him. He challenged the payment, but he surcharged provisionally only. He said in effect:—"I have, as yet, no evidence that ought to be reasonably satisfactory to anyone that this woman is permanently incapacitated from work; but I give you until the close of the audit to give me further evidence, and I will take a satisfactory medical certificate, if you can get it." He did not refuse to take other evidence, though he suggested the certificate. If he had unreasonably refused other evidence, or if the evidence given had been such as ought to have satisfied him, though I am strongly of opinion that the Court would have jurisdiction to consider the matter on *certiorari*, I think that an appeal to the Local Government Board, as distinguished from investigation by *certiorari*, would have been the proper course. But being satisfied that the real object of this proceeding was to try to get a decision that the burden of proving the legality of the payment is shifted by the fact of its being allowed by the Guardians, I hold that this is an attempt to destroy the foundation of the auditor's jurisdiction, and to confine his power to the mere checking of accounts.

We are against this contention of the Guardians, and the appeal must be dismissed.

At the same time our decision must not be misunderstood. We do not decide that Jane Weir is not a proper object for outdoor relief. We say nothing to prevent a grant to her, nor to prevent the surcharge from being remitted, if, on further inquiry, or on production of further evidence, she is shown to be permanently incapacitated for work The Local Government Board also can let the Guardians off, even if they have been mistaken. But upon the case as presented to the auditor, and upon the question before us, he was within his right in calling for further evidence to justify this or any other like item of expenditure in the accounts of the Guardians submitted to him for audit.

WALKER, L.J., concurred.

HOLMES, L. J. :—

I concur. The question for decision is, whether, when an auditor goes down to investigate the accounts of Guardians, and finds that a payment has been made for outdoor relief on the ground of permanent incapacity, and if there is nothing more than the paper which was before the Board of Guardians and a decision of the Guardians, he is at liberty to ask for further information. The Guardians have taken up the position that he is not; that he ought to be satisfied with what has been done; and that if nothing more is produced before him he should adopt the payment that has been made. That, in my opinion, is not the law. I think that it is not only within the power, but that it is the duty of the auditor to ask for the grounds on which the payment was made, and if he is not satisfied, to declare it an illegal payment and to surcharge. From the way the case was brought into Court it is obvious that it has come here for the purpose of having that question decided; and the only reason I make any observation is to show that that is the only question we are now deciding. I think the conditional order for a writ of *certiorari* should be discharged.

Solicitors for Thomas Ferguson: *L. J. Holmes.*
Solicitor for J. More O'Ferrall: *John O'Hagan.*

R. D. M.

K. B. Div. 1902. Nov. 13, 19, 24-26. Dec. 20.

R. (LANKTREE) *v.* M'CARTHY, HOLLAND, AND O'DWYER (1).

Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 *Vict. c.* 20), *sections* 2 (1), (2), (4), 5—*Proclamation*—Dublin Gazette—*Inciting to intimidation—Newspaper containing intimidatory matter—Circulation—Evidence—Summons.*

Summons charging the defendants in three counts—(1) with having, in a district proclaimed under the Criminal Law and Procedure (Ireland) Act, 1887, unlawfully used intimidation towards certain persons whose names were unknown, to wit, persons who had taken, used, or occupied farms of land in Ireland for grazing purposes, or from which tenants had been evicted, in consequence of said persons having done acts which they had a legal right to do, namely, to take, use, and occupy such farms; (2) with having in said district unlawfully incited certain persons whose names were unknown to use intimidation towards certain other persons whose names were unknown, to wit, &c. [as in 1st count]; (3) with having in said district unlawfully incited certain persons whose names were unknown unlawfully to take part in a criminal conspiracy to induce certain other persons whose names were unknown, to wit, &c. [as in 1st count]. The magistrate having convicted on the 1st count, and having held that there was no evidence that the "inciting" complained of in the 2nd and 3rd counts reached the persons alleged to be incited, acquitted all the defendants on these counts.

Held, that the summons was sufficiently specific.

A copy of the *Dublin Gazette*, purporting to be published by authority and to be printed under the authority of His Majesty's Stationery Office, *held*, admissible to prove a proclamation under the Act contained in the *Gazette*.

Reg. v. *Wallace* (17 Ir. C. L. R. 206) distinguished.

Upon a charge of incitement as preferred in the summons, where the incriminated matter was published in a newspaper, the production of a copy of the newspaper purchased from a firm of newsagents described in an advertisement in the paper as wholesale agents, and who were proved to have been supplied with the papers in pursuance of a wholesale order, and which advertisement stated that the paper had agents for sale throughout Ireland, *held*, sufficient evidence of circulation to prove that the incitement reached persons intended to be incited.

Held, further, by Lord O'Brien, L.C.J., and Madden and Boyd, JJ. (*diss.* Gibson, J.), that to establish the offence of "using intimidation towards," charged in the 1st count, it was not necessary to prove that the intimidatory matter reached any person intended to be thereby intimidated. The statutory

(1) Before Lord O'Brien, L.C.J., and Gibson, Madden, and Boyd, JJ.

offence is completed by the publication of the intimidatory matters with intent to intimidate, and therefore the proprietor of the paper was rightly convicted. The Criminal Law and Procedure (Ireland) Act, 1887, contrasted in this respect with the Conspiracy and Protection of Property Act, 1875.

Per Gibson, J.: To establish intimidation as distinct from an attempt to intimidate, it is necessary to prove that some one might, in fact, be affected; and an overt act of attempted intimidation is not necessarily the complete offence.

Held, as to the 2nd and 3rd counts of the summons, that, in order to warrant a conviction under those counts, there should be evidence that the incitement reached the persons intended to be incited, and that such evidence did exist, and that the magistrate was wrong in holding there was no such evidence.

Held, in result, by the majority of the Court, that the judgment upon the 1st count against the proprietor of the newspaper should stand; but, by all the Court, that, on the evidence against the alleged printer and publisher and the business manager, which the Court held insufficient to prove implication as against them, the judgment against them should be set aside.

CASES STATED by Mr. D. Mahony, Divisional Justice of the Dublin Police District, under the 20 & 21 Vict. c. 43, for the opinion of the Court, one at the instance of the defendants, and the other at the instance of the complainant.

The material facts were in substance as follows:—

The defendants were charged—(1) for that they, between the 1st July, 1902, and the 8th September, 1902, did, by the publication of certain matter in a certain newspaper called the *Irish People*, in the county borough of Dublin aforesaid, being a proclaimed district under the provisions of the Criminal Law and Procedure (Ireland) Act, 1887, wrongfully and without legal authority, unlawfully use intimidation towards certain persons whose names are unknown, to wit, persons who had taken, used, or occupied farms in Ireland, let for grazing purposes, or from which tenants had been evicted in due course of law, in consequence of the said persons having done acts which they had a legal right to do, namely, to take, use, and occupy such farms as aforesaid. (2) That they, between the said days, did, by the publication of certain matter in a certain newspaper called the *Irish People*, in the county borough, &c., being a proclaimed district as aforesaid, wrongfully and without legal authority, unlawfully incite certain persons whose names are unknown, unlawfully to use intimidation towards certain other persons whose names are unknown, to wit, &c. [as in 1st count]. (3) That they, between the said days, did, by the publication of certain matter in a newspaper called the *Irish People*, in the county borough, &c., being a proclaimed district as aforesaid, unlawfully incite certain persons whose names are unknown, unlawfully to take part in a criminal conspiracy punishable by law, at the time of the passing of the said Act, to wit, a conspiracy unlawfully to induce certain other persons whose names are unknown, to wit, persons who had taken, used, or occupied farms of land in Ireland let for grazing purposes, or from which tenants had been evicted in due course of law, not to take, use, or occupy same.

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THE KING (LANKTREE) *v.* M'CARTHY AND OTHERS.

On behalf of the complainant there was given in evidence a copy of the *Dublin Gazette* of August 29th, 1902, containing the following proclamation :—

By the Lords Justices and Privy Council in Ireland.

A PROCLAMATION.

ASHBOURNE, C.
POWERSCOURT.

WHEREAS it appears to Us to be necessary for the prevention, detection, and punishment of crime and outrage in Ireland, that the hereinafter provisions of "The Criminal Law and Procedure (Ireland) Act, 1887," should be in force within the County Borough of Dublin:

Now We, the Lords Justices-General and General Governors of Ireland, by and with the advice of the Privy Council in Ireland, by virtue of section 5 of "The Criminal Law and Procedure (Ireland) Act, 1887," and of every power and authority in this behalf, do, by this Our Proclamation, declare that from the date hereof sections 3 and 4 of "The Criminal Law and Procedure (Ireland) Act, 1887," relating to proclaimed districts, shall be in force within the County Borough of Dublin:

This Proclamation shall be promulgated by the same being published in the *Dublin Gazette*.

Given at the Council Chamber, Dublin Castle, this 1st day of September, 1902.

GEORGE WYNDHAM. JOHN ATKINSON.

GOD SAVE THE KING.

The said copy was headed "PRINTED BY AUTHORITY," and at foot were the words :—

Printed under the authority of His Majesty's Stationery Office by ALEXANDER THOM & COMPANY, LIMITED, of Nos. 87, 88, and 89, Middle Abbey-street, in the parish of St. Thomas, in the city of Dublin.

It may be taken, for the purposes of this report, that the defendant Timothy M'Carthy was the proprietor of a newspaper, the *Irish People*, printed and published in Dublin; also that articles in the issues of newspapers published at the dates hereinafter mentioned contained matters which in the opinion of the Court constituted an offence under the 2nd section of the Criminal Law and Procedure (Ireland) Act, 1887. To prove circulation Charles Eason, a member of the firm of Eason and Sons, Limited, newsagents, Dublin, was called by complainant,

and proved that he sold the said newspaper, the *Irish People*, in his premises in Dublin, meaning thereby, as the magistrate found, that the said newspaper was for sale there, and that the copies as sold by him were purchased by him at the office of said newspaper, the *Irish People*, 105, Capel-street, aforesaid, and that they arrived in his office in pursuance of a wholesale order. He also proved that he had seen an advertisement in the *Irish People* of the 19th July, 1902, in which his firm were referred to as wholesale agents for said newspaper. This advertisement was headed "To Irish Nationalists," and stated that the paper had agents for sale throughout Ireland. It was proved that a copy of each of said newspapers known as the *Irish People*, of the 19th July, 26th July, 9th August, and 6th September, 1902, respectively, had been purchased at the premises of Messrs. Eason & Sons, Limited, Dublin, aforesaid, and also that a copy of said newspaper of the 6th September, 1902, had been purchased on the said premises, 105, Capel-street, Dublin.

The papers purported to be printed and published by Stephen Holland, but there was no sufficient evidence connecting the defendants O'Dwyer and Holland with the publications.

Counsel on behalf of the defendants contended:—

(*a*) That the copies of the *Dublin Gazette* put in evidence did not purport to be printed and published "by the King's authority" as required by section 12, sub-section 3, of the Criminal Law and Procedure (Ireland) Act, 1887.

(*b*) That there was no evidence of the publication of any of the newspapers relied on by the complainant.

(*c*) That the summons was bad in form, inasmuch as it deduced the offence charged through three classes of persons unknown, and further, as it contained an alternative charge in each count.

(*d*) That there was no allegation in the summons of any specific acts having been performed by the defendants

(*e*) That there was no evidence that the incitement alleged had reached any individual.

(*f*) That there was no evidence of such class of persons existing as were alleged to be intimidated.

(*g*) That there was no evidence that the defendants or any of them were responsible for the publication of the newspapers in question.

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(*h*) That the language used in the articles in question did not constitute intimidation or "incitement" within the meaning of the Criminal Law and Procedure Act (Ireland), 1887.

No evidence was given on behalf of the defendants.

As regards the contentions of the defendants' counsel respectively, Mr. Mahony stated that he held as follows:—

(*a*) That the *Dublin Gazettes* put in evidence were, having regard to the provisions of the Documentary Evidence Act, 1882, properly tendered, and I accordingly received and acted on them.

(*b*) That there was evidence of publication of the newspapers, and I held the publication of same to have been proved.

(*c*) I held that the summons was not bad in form; that it was no ground of legal objection; that the offence was deduced through persons unknown; and that the summons did not contain an alternative charge in any of the counts.

(*d*) I held that, as regards the 1st count, "intimidation," as defined by the 19th section of the Criminal Law and Procedure (Ireland) Act, 1887, had been committed within the county borough of Dublin, and the Police District of Dublin Metropolis, and I was satisfied that the intent to intimidation was clearly shown by the newspaper articles received in evidence.

(*e*) I held that the summons was sufficiently specific, and that the case of *Reg.* v. *M'Kenzie* (1), relied on by counsel for the defendants, was not, having regard to the form of the summons in this case, an authority in support of such counsel's contention.

(*f*) I was of opinion, having regard to the decisions in *Reg.* v. *Most* (2) and *Rex* v. *Krause* (3), that it was necessary for the complainant, on the 2nd and 3rd counts, to prove that the newspapers in question were circulated amongst the parties whom it was intended to affect. I held that there was no evidence whatever that the newspaper articles in question were communicated to any single person whom it was alleged by the complainant they were intended to influence, or that the incriminated articles were ever circulated. For these reasons I dismissed the summons on the said 2nd and 3rd counts.

(*g*) I held that there was evidence of the existence of the class

(1) [1892] 2 Q. B. 519. (2) 7 Q. B. D. 244. (3) 66 J. P. 121.

of persons alleged to be intimidated, and that such class of persons did in fact exist.

(*h*) I held that there was evidence that the defendants were responsible for the publication of the newspapers in question, and that each of them was so responsible.

(*i*) I was satisfied and found that the articles in respect of which the summons was issued did constitute intimidation within the meaning of the Criminal Law and Procedure (Ir.) Act, 1887.

(*j*) I was satisfied that these articles, if proved to have been circulated amongst the persons intended to have been affected thereby, would have constituted incitement to intimidation, and to taking part in the criminal conspiracy alleged in the 3rd count of the summons, but my ruling (*f*) aforesaid made it unnecessary for me to declare this finding.

If the Court is of opinion that my ruling on the said 2nd and 3rd counts of said summons is wrong, then the case should be remitted to me to be dealt with according to law.

The magistrate convicted all the defendants on the 1st count, but dismissed the charges on the 2nd and 3rd counts. Each party asked for a case stated on the points decided against them, and two cases were stated. That stated at the instance of the complainant was first argued.

The questions for the determination of the Court were :—

(1) Was the conviction on the 1st count right?

(2) Was it necessary for the complainant to prove that the newspapers in question were circulated amongst the persons whom it was intended to affect or influence?

(3) If so, was there any evidence that the said newspapers were so circulated?

The Solicitor-General (*Campbell, K.C.*), *Chambers, K.C.*, and *Morphy*, for the complainant.

Bodkin, K.C., and *G. M'Sweeny*, for the defendants.

[The following authorities were cited in addition to those referred to by Mr. Mahony: *Ex parte Connors* (1); *R.* v. *Wallace* (2); *R.* v. *Holt* (3); *Judge* v. *Bennett* (4); *R.* v. *Sullivan* (5); *R.* v. *Parnell* (6).]

(1) Crimes Act Cases, 157.
(2) 17 Ir. C. L. R. 206.
(3) 5 T. R. 436.
(4) 52 J. P. 247.
(5) 20 L. R. Ir. 550.
(6) 8 L. R. Ir. 17.

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Dec. 20.

LORD O'BRIEN, L.C.J.:—

These two cases have so many points in common that they may be dealt with at the same time. As to some of the questions raised, we have experienced no difficulty; others have not been unattended with difficulty. I shall, in the first place, deal with those questions which, in our opinion, present no difficulty.

First, then, as to the form of the summons. The summons is, in our judgment, unexceptionable in point of substance and in point of form; and we adopt what Mr. Mahony has said with reference to it.

Next, as to the admissibility in evidence of the *Gazette*. This point was very ably and elaborately argued by the counsel for the defendants, who left nothing unsaid that could with propriety be advanced on behalf of their clients. The point as to the *Gazette* was this—that on the face of the *Gazette* were the words "published by authority," and it was contended that that was not sufficient to render it admissible in evidence, as the Act of Parliament required, as a condition of admissibility in evidence, that the *Gazette* should purport to be printed and published by the Queen's authority; and counsel for the defendants cited *The Queen* v. *Wallace* (1) in support of their contention. It was held in *The Queen* v. *Wallace* (1) that the *Gazette* there referred to was not admissible in evidence, because it simply purported to be printed by Alexander Thom & Co. It did not, as the present *Gazette* purports to be, purport to be printed under the authority of His Majesty's Stationery Office by Alexander Thom & Co.

In the *Gazette* referred to in *The Queen* v. *Wallace* (1) there was no reference to the authority of the Crown, and therefore the *Gazette* there referred to was held not to be admissible in evidence. In delivering the judgment of the Court in that case, Monahan, C.J., said:—"No doubt *The King* v. *Holt* (2) is a binding authority; and if in the present case the paper produced purported to be printed by Her Majesty's printer, it would have been, irrespective of the statute, evidence of the issuing of the proclamation and the publication thereof in the official *Dublin Gazette*; but, in our opinion, that case does not apply to the present, in which the

(1) 17 Ir. C. L. R. 206. (2) 5 T. R. 436.

paper does not purport to be printed by the Queen's printers or by the authority of Her Majesty's printers, or, in fact, by any particular authority."

Now, counsel for the prosecution have relied on this passage in the judgment of Chief Justice Monahan, and I think it clearly established that the *Gazette* in the present case was admissible in evidence at common law; the *Gazette*, at the end of it, purported to be printed under the authority of His Majesty's Stationery Office. This, of course, was tantamount to a statement that it was printed by the authority of His Majesty, and reading the whole of the *Gazette* we must construe the word "authority" at the head—at the beginning of the *Gazette*—as being an authority identical with the "authority" referred to at the end, that is, the King's authority; this being so, it follows that the *Gazette* was printed and published by the King's authority, and purported to be printed and published by the King's authority, and was therefore admissible under the Crimes Act as well as by the common law. Mr. Justice Ashurst said, in *The King* v. *Holt* (1), that the *Gazette* is a means of proving all acts relating to the King and the State.

The next point I shall apply myself to is whether there was any evidence of the publication and circulation throughout Ireland of the incriminated articles. We experience no difficulty as to this. The evidence of Mr. Eason, at whose establishment the papers containing these incriminated articles were bought, affords ample evidence of the publication and circulation of the papers. He was himself a newsagent, and he said he bought the *Irish People* wholesale at the office of that newspaper, and that the copies of the *Irish People* which he sold he purchased at that office. In the issue of the 19th July there is an advertisement in which his firm was referred to as wholesale agents for said paper. This advertisement is addressed to Irish Nationalists, and states, in so many words, that newsagents sell the paper all through Ireland. There was abundant evidence of the publication of the incriminated articles and of the circulation of the paper throughout Ireland. The summons contains charges of inciting

(1) 5 T. R. 436.

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persons unknown to use intimidation, and of inciting persons unknown to take part in a criminal conspiracy, to induce persons not to use or occupy grazing farms or farms from which others had been evicted. There is no limitation as to the class, number, or residence of the persons described as persons unknown, the description is general. The magistrate seemed to think that there was an implied, if not express, limitation to persons resident within certain areas outside the limits of Dublin, and to consider that Dublin was not within the scope of the summons, but there is no such limitation. The summons is quite general. The whole of Ireland is within its scope. An appeal to organize a conspiracy to induce persons not to take grazing lands or farms from which other persons were evicted might find as ready a response in Dublin as elsewhere throughout Ireland. There must be evidence that the incitement reached the persons intended to be affected wherever they were, in Dublin or elsewhere, as was decided in *The King* v. *Krause* (1). Such evidence did undoubtedly exist, but it was for the magistrate to say whether he would act upon it or not. This was his exclusive function. As to the question, then, of "inciting," arising on the second and third counts of the summons, we experience no difficulty. We are unanimously of opinion that there was evidence that the inciting therein referred to did reach the persons alleged to be incited, and that the magistrate was wrong in holding there was no such evidence.

I now come to what I have all through considered the most important point raised in the present controversy, namely, whether Mr. Mahony's finding as to the first count of the summons, that the publication of the impugned articles was sufficient to constitute intimidation within the meaning of the Criminal Law and Procedure (Ireland) Act, 1887, was right. That Act provides that the expression "intimidation" includes any words or acts intended and calculated to put any person in fear of any injury or danger to himself or to any member of his family, or to any person in his employment, or in fear of any injury to or loss of property, business, employment, or means of living.

(1) 66 J. P. 121.

This is not an exhaustive definition of the word intimidation, but it is clear as far as it goes. Mr. Mahony held that the articles in respect of which the summons was issued were intended and calculated to put persons in fear of injury and danger to themselves and to members of their family, and in fear of injury to and loss of property, business, and employment; in fact, he held that the publication of the articles in question was within the definition, so far as it went, of intimidation in the statute; and having found this, he was of opinion that the offence was complete, irrespective of the question whether the articles had reached the person or persons, or class or classes, intended to be affected by them.

During the course of the argument we endeavoured to illustrate the effect of so holding by putting suppositious cases. We asked if words were published in the North of Ireland which were calculated and intended to put persons in the South of Ireland in fear, would that be sufficient to constitute the offence though the words never reached the people in the South of Ireland. Mr. Mahony's judgment went the whole way. He decided that once the publication took place of words interdicted by the definition, that is to say of words calculated and intended to put a person or persons in fear, the offence was complete, irrespective of the question whether those words reached that person or not.

After very careful consideration of the matter, I have come to the conclusion that Mr. Mahony's view is right—right as to the intimidatory character of the language, and right as to the publication of that language, calculated and intended as it was, being intimidation within the meaning of the statute. It must, of course, be borne in mind that the first count of the summons is not conversant with "inciting": it charges that the defendants used intimidation towards persons unknown, &c. If you use incitement there must naturally be evidence that the incitement reached the persons alleged to be incited; but this first count is not, as I have said, conversant with inciting. It simply alleges "that the defendants used intimidation towards." As to the intimidatory character of the language, we must remember that the scourge of boycotting is not to be confounded with what has been described as exclusive dealing—we must be careful not to permit

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euphemistic or ironical description to conceal what was really meant. As to the publication of the impugned articles being "intimidation" within the meaning of the statute, I rest my opinion on the character of the definition of intimidation in the Crimes Act, and on a consideration of the difference of the language used in that Act as compared with the language of the Conspiracy and Protection of Property Act of 1875. A comparison of the two Acts of Parliament leaves, in my opinion, no doubt as to the construction of the Crimes Act. The words of the 7th section of the Conspiracy and Protection of Property Act of 1875 are as follows:—"Every person who, with a view to compel, &c., uses violence to, or intimidates such other person, his wife or children," shall be subject to the punishment therein prescribed. Now, the all-important word is the word "intimidates." The language is not, as in the Act we are now construing, "uses intimidation to or towards," the word is "intimidates," that is to say, actually puts a person in fear. There must be, so to speak, subjective intimidation to warrant a conviction under the Conspiracy and Protection of Property Act of 1875. In the case of *Judge* v. *Bennett* (1), which was a prosecution under the latter Act, the late Master of the Rolls in England, Sir A. L. Smith, asked, "What is the meaning of intimidates?" and he answered his own question by saying, "The use of language which causes another man to fear." This being so, it became and was extremely difficult to get convictions under the Act, because the persons sought to be intimidated were so terrorised that they came forward and swore they experienced no fear whatsoever—not an unusual occurrence in this country when people are thoroughly terrorised. The evil of intimidation, instead of being checked, was stimulated by the want of proof and the break-down of prosecutions. The greater the degree of intimidation used the greater the probability of immunity—so thorough might be the character of the intimidation that persons against whom it was directed might, and in several cases did, come into the witness chair, and whilst they were the victims of a coercive and overbearing intimidation protested in violation of their oaths that they

(1) 36 W. R. 104.

knew no fear. This plainly aggravated the evil it was intended to repress, and to provide a remedy the definition of intimidation was enlarged, so as to make the publication of intimidatory matter with intent to intimidate an offence which could be reached and dealt with by summary procedure. The moral guilt of the person who, with a view to compel others to surrender their legal rights, deliberately uses and publishes words which are calculated and intended to put those other persons in fear is as great as the moral guilt of the person who succeeds in his effort to create fear—and the Legislature resolved by the enlargement of the definition to put in the hands of a summary tribunal an instrument for the punishment and suppression of the crime, which theretofore, by reason of the degree to which it was carried, had become so elusive, the victim being only too ready to swear that the intimidating paper or article never reached him, or, if it did, that he was in no way influenced by its contents. The much canvassed words "to or towards" are to be taken in connexion with and in immediate relation to the intimidatory language used, that is to say, in giving effect to these words you must look at the language used and ascertain whether the language is of the intimidatory character described, and is, so to speak, self-directed, that is to say, in itself directed to or towards the persons sought to be intimidated, directly to the person sought to be intimidated, or indirectly towards him through his wife or family or property. The inquiry is not whether the intimidatory language reached him, but whether it was of the defined character, so far as the definition went, and was directed to or towards the person sought to be intimidated. This is certainly the most important point in the case; and I entirely agree in the conclusion at which Mr. Mahony arrived with reference to it. This being so, the judgment against Mr. M'Carthy on the first count of the summons must stand; but the case against Mr. O'Dwyer and Mr. Holland is susceptible of different consideration. As to Mr. Holland, the judgment against him must be set aside. He is alleged to be the printer of the *Irish People*, and I have no moral doubt that he is, but there is no legal proof that he fills that position. His name is on the paper as printer and publisher, and that would be sufficient in England to establish that he both

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printed and published the paper. But the Act of Parliament which provides for this result in England has not been extended to Ireland, and there is no other evidence in the case to establish that he was printer—none sufficient either in itself or in connexion with the statement in the newspaper. The evidence that he frequented the office and was in some way connected with the paper is not sufficient. The case against Mr. O'Dwyer, the "business manager," stands on a somewhat peculiar ground. It is proved that he was the business manager, but this was not, in my opinion, sufficient to establish his criminal responsibility. The position of business manager may be confined to the management of the paper from an exclusively financial point of view—the bare naked expression "business manager" is not enough—a little more might expand the *prima facie* character of his position, but we have not that little here. The attempt to prove that he sold a copy of the newspaper broke down. A policeman sent in a boy to purchase a copy of the *Irish People* at the office of the paper, and though he saw Mr. O'Dwyer sell him a paper, he refused to identify the copy of the paper which he produced at the trial with the paper the boy purchased, that is to say, he would not swear that the copy of the paper the boy bought was the identical copy he handed him. There was an essential *nexus* left unestablished. The boy was produced and refused to give evidence, and the policeman, as I have stated, would not say that the copy the boy gave him was the copy Mr. O'Dwyer sold to him. The authority who directed the prosecution is in no way responsible for this, for measures were taken to establish the essential *nexus* by the evidence of the boy, and the latter refused to give any evidence—indeed he refused to be sworn. The judgment against Mr. O'Dwyer must therefore be set aside. The general result is that the conviction on the first count of the summons against Mr. M'Carthy must stand, and the judgment against Mr. O'Dwyer and Mr. Holland must be set aside, and a judgment of acquittal entered in reference to them.

We must answer the questions submitted in the two cases, and we answer them as follows:—In the case that was first argued, to both questions we answer "Yes"; to the questions in the second case we answer, that save in respect of finding (*h*) all the findings were correct in law, and in respect of finding (*h*)

it was wrong so far as it made Mr. O'Dwyer and Mr. Holland responsible for the publication of the paper, but right so far as it made Mr. M'Carthy responsible therefor.

GIBSON, J. :—

I agree in the result stated by my Lord, save on one point as to which my difficulty is not yet removed.

The prosecution proceeds on two charges, namely, use of criminal intimidation and incitement. These charges are each founded on the same publications, and are sought to be established by the same evidence; they represent different legal aspects of one alleged criminal act. The magistrate has dismissed the charge of incitement on the ground that there was no evidence that anyone was incited; but on the same evidence has convicted on the charge of using intimidation.

To establish incitement, as distinct from attempt to incite, it is necessary to prove that some one is reached to whom the incitement is directed; and the determination, in the case of a journal, whether there is guilty incitement or not, is influenced by the locality and circulation, as well as by the character of the incriminated matter. An article may be mischievous and even criminal without being an incitement to crime; and what under certain circumstances might be deemed an incitement, under different conditions might not bear that character.

But a newspaper addressed to and circulating among the public appeals to all its readers; the ramifications of intimidation are wide, subtle, and occult; and whether the circulation here was metropolitan only or extended throughout Ireland (as the paper at p. 8 states), though the weight of the evidence may in each case be different, if the paper contained matter capable of being construed as criminal incitement, there was evidence from which it might be inferred that such incitement reached persons intended to be incited. Whether the evidence is such as to justify a conviction is for the decision of the magistrate; but he was clearly wrong in holding that there was *no evidence* that anyone intended to be incited was reached.

Applying the same reasoning, I have no doubt that there was evidence of the use of intimidation to or towards the classes

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intended to be intimidated; and the conviction on this charge, if rested on such evidence, could not be questioned. I am inclined to suspect, however, from the language of the judgment below, that the magistrate did not base his decision on such evidence, but on the view that mere publication of intimidatory matter was in itself a complete offence irrespective of the consideration whether it reached or affected or could have reached or affected anyone of the class of persons to be intimidated. He seems to have held that an overt act of attempt to use intimidation, though arrested at once in its consequences, was the use of intimidation towards the persons against whom such intimidation was intended to be directed. An intimidatory newspaper, therefore, of which the entire issue—save one copy sold to a police officer—was seized, or an intimidatory postcard or telegram stopped at once by the postal authorities in the post before delivery, or even recalled before delivery by the repentant sender, would, as I gather, be regarded by him as a user of intimidation, though on a charge of incitement it would not be more than an attempt to incite.

The point is not generally of practical importance, as where the circumstances are such that anyone on account of himself, his family, servants, or customers could have been in fact intimidated there would be evidence to support a conviction, as the statute eliminates the subjective element. The offence may be committed, though no one is in fact intimidated.

But is an overt but abortive act of attempted intimidation necessarily a use of intimidation? Is there no such thing as an attempt as distinct from the complete offence? Under the Act of 1875, section 7, from which our legislation takes its origin, the offence is wrongfully and with the intent therein defined using violence to or intimidating the person, his wife or children, or injuring his property.

Under the Crimes Act, 1882, section 7, the offence is wrongfully and with the intent therein defined using intimidation (as explained in the section), or inciting to use intimidation to or towards any person. The word "intimidation" is explained in the section substantially in the same way as in the Act of 1887. The section does not expressly refer to violence, as the definition would comprehend any act of intimidatory violence. The actual

success or subjective result of the intimidation is made immaterial by the use of the term "calculated." The section links together use of intimidation and incitement to such use; and intimidation of the family and injury to property are not made direct offences as they are in the Act of 1875.

If we compare the structure, plan, and grammar of section 7 of the Act of 1882, with section 7 of the statute of 1875, may not the word "towards" properly be construed as referring to indirect intimidation practised on a man through his family, servants, customers, &c., and the word "calculated" as meaning calculated actually and in fact under the circumstances of the case? From the definition of intimidation, "towards" would be necessary in ordinary English speech to denote the difference between intimidation used to or on a person directly, and intimidation indirectly applied through others.

The Act of 1887 may give some support to this view; it expressly introduces the use of violence as an offence. Intimidation has of course a wider radius than physical violence, but the association of violence with intimidation suggests that as overt act may be an attempt in the former case, so it may be in the latter.

The express inclusion of violence was, perhaps, unnecessary, as the definition of intimidation might include acts of intimidatory violence. As to so much of intimidation as relates to such acts there could be, I think, an overt act which would only amount to an attempt.

If the word "towards" can be reasonably interpreted as referring to indirect intimidation, ought the Court to give it a wider operation? The statute, which is penal, should be strictly construed, and (as Lord Cairns said in a well-known case) the person to be charged must come within the letter of the law; if outside the letter, he is free, however within the spirit of the law the case might otherwise appear to be.

The point I have been discussing is not governed or touched by authority. In *Whelan* v. *Fisher* (1) the objection was not made, nor could it have been made, with any prospect of success, as the newspaper there prosecuted circulated where Sheehan (to

(1) 26 L. R. Ir. 340.

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and towards whom the intimidation was charged to have been used) resided; so that the inference properly and clearly might have been drawn that it might affect Sheehan or those dealing with him.

In no prosecution under the Crimes Acts that I recollect would the objection now under consideration have been available; and in the case before us there was evidence on which the magistrate, if he had seen fit to act on it, would have been justified in convicting. When intimidatory action of the defined criminal character takes place under circumstances that it is calculated in fact to intimidate any person or class, directly or indirectly, the offence is complete—the actual success of the intimidation is immaterial.

The point, therefore, discussed is more of academic interest than of practical importance. I appreciate the strength of the argument in support of the magistrate's interpretation; I by no means say that it may not be right; but as I am not satisfied that it is, I have sought briefly to indicate the nature of the reasoning which at present induces me to incline to a contrary view.

MADDEN and BOYD, JJ., concurred with the Lord Chief Justice.

Solicitor for the complainant: *Sir P. Coll.*
Solicitor for the defendants: *V. Kilbride.*

J. G. T.

HANLON *v.* NORTH CITY MILLING COMPANY (1).

Appeal.
1901.
Dec. 9, 10.
1902.
Jan. 16.

Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37)—*Employment of labourer in a dock—Factory—Occupier.*

A labourer (not a seaman) was employed to bring the employers' barges, which were kept in the employers' dock at night, from their places in the dock, when the dock gates were opened, alongside vessels in an adjoining river, for the purpose of taking cargo into the barges and bringing it back to the quay of the dock to be there unloaded. In the course of this employment the labourer fell into the dock and was drowned:—

Held, that the dock was a "factory," and that the employers were the "occupiers" of it within the meaning of the Workmen's Compensation Act, 1897, and that the widow of the deceased was entitled to compensation under that Act, payable by the employers.

APPEAL by the North City Milling Company from the decision of the Recorder of Dublin, awarding the applicant, Mary Hanlon, £150 compensation for the death of her husband, who was drowned in the Spencer Dock, belonging to the defendant Company, in whose employment he was a labourer. The facts are fully stated by Fitz Gibbon, L.J., and Walker, L.J.

O'Brien, K.C., and *Littledale*, for the appellants.

Rynd and *Mac Laine*, for the respondent.

[The following cases were cited:—*Woodham* v. *Atlantic Transport Company, Ltd.* (2); *Flowers* v. *Chambers* (3); *Hall* v. *Snowden, Hubbard & Co.* (*No.* 2) (4); *Henessey* v. *M'Cabe* (5); *Merrill* v. *Wilson, Sons & Co., Ltd.* (6); *Lysons* v. *Knowles* (7); *Raine* v. *Jobson* (8); *Bartell* v. *Gray & Co.* (9): *Cattermole* v. *Atlantic*

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) [1899] 1 Q. B. 15.
(3) [1899] 2 Q. B. 142.
(4) *Ibid.* 136.
(5) [1900] 1 Q. B. 491.
(6) [1901] 1 Q. B. 36.
(7) [1901] App. Cas. 79.
(8) *Ibid.* 404.
(9) 18 *Times* L. R. 70.

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Transport Company, Ltd. (1); *Blair* v. *Dundalk Steam Packet Co.* (2); *O'Hanlon* v. *Dundalk Steam Packet Co.* (3).]

Cur. adv. vult.

FITZ GIBBON, L. J.:—

This is an appeal from a judgment of the Recorder of Dublin, awarding to the applicant, Mary Hanlon, £150, being the minimum sum mentioned in the Workmen's Compensation Act, 1897, as compensation for the death of her husband Edward Hanlon, who was drowned in the Spencer Dock on January 10, 1901, when in the employment of the respondent Company. In such cases we must take the facts from the judgment of the Court below; and we have no jurisdiction to question any finding or inference of fact, if there is reasonable evidence to support it. The Recorder has found that the Spencer Dock is a wet dock formed in the terminus of the Royal Canal, where it adjoins the tidal waters of the Liffey, from which it is separated by dock-gates, opened on the tide serving. Hanlon was employed as a labourer at 18*s.* per week; part of his duty was to bring the respondents' barges, which were kept in the dock at night, from their places in the dock, when the dock-gates were opened, to vessels in the river, from which he was to help in taking cargo into the barges and bringing it back to the quay of the dock to be there unloaded.

Some matters about these barges are stated in the case which do not appear to us to be material; but they were floating vessels, belonging to and used by the respondent Company, in their possession and in the custody of their servants, which were kept in the dock at night for the purpose of the respondents' business, in charge of their servants, of whom Hanlon was one. That business was a *land* business, and there was nothing *sea-going* about Hanlon.

About 2 a.m. on the day when he met his death, he was engaged in preparing to bring one of these barges from its place in the dock to a vessel in the river. In so doing he accidentally fell into the dock and was drowned. The material question

(1) 18 *Times* L. R. 102. (2) 33 I. L. T. R. 132. (3) *Ibid.* 36.

is whether this employment of Hanlon, in the course of which the Recorder has found that he lost his life by accident, was an employment to which the Workmen's Compensation Act, 1897, applies.

The contention of the respondents, as stated by the Recorder, was, that as the casualty occurred when Hanlon was in a lighter and in a *wet* dock, the statute did not apply. The question may therefore be put in the alternative form: Does the Act apply to the employment of a landsman labourer in a lighter in a wet dock? None of the Acts makes any express distinction between a wet dock and a dry dock. I cannot see that such a distinction can be implied; nor do I even see how it could be worked out if it were drawn. A dry dock can only mean a dock—such as a graving dock, or a repairing dock, or a shipbuilding dock—which can be filled and emptied as occasion requires, as distinguished from a dock which is kept always full of water, and in which water is retained to float the vessels that are in it, while the tidal or other waters with which it is connected may be at a different level. Does the Workmen's Compensation Act apply to the employment in a dock of this class, to which the Spencer Dock belongs, of a labourer of the class to which Hanlon belonged? Two ideas are suggested by the legislation so forcibly as to account for the attempt made to exclude Hanlon's case from the Act. The first of these is the idea that employments connected with the use of machinery were alone intended to be brought within the operation of the Act. The second is that marine employments are excluded from the Act, and that employers of "seamen" possess an immunity from liability to pay compensation for injuries to their servants. The history of the legislation, the use of the term "factory" to describe the *locus* of the workman's employment, and the special provisions made with respect to ships and seamen, are the foundation for these ideas; but we have to see whether that foundation extends, upon the language of the statutes, to Hanlon's case.

The fate of the decisions of the Court of Appeal in England indicates the difficulties of construction prescribed by these Acts. In *Stuart* v. *Nixon* (1) Lord Halsbury speaks of "difficulties

(1) [1901] A. C. 79.

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sought to be solved by the use of words which were perhaps not the best chosen." He describes the Act of 1897 as a "very singular application of the fashion of legislation by reference"—a fashion with which the Irish Land Law Acts and Local Government Acts have made us familiar. He says: "The statement of that legislation is somewhat grotesque, but that is what the Legislature has done." He says again: "If the Legislature has thought proper to make machinery a factory," no Court has any "right to criticise what the Legislature has done." Yet Lord Davey describes the Act as "extraordinarily ill-drawn." We have only to say whether it applies to Hanlon's case, and I cannot express the result of my study of it better than in Lord Lindley's words in *Raine* v. *Jobson* (1): "I do not see how to get out of the language of the sections," though I do not suggest that it is any part of my duty to make any special effort to extricate myself from it as if it was an ambush or a trap.

In *Stuart's Case* (2) Lord Halsbury says: "The substantive intention and meaning of this statute is that every workman in the prescribed trades should be entitled to compensation." Was Hanlon's employment one of these "prescribed trades"? The Act which gives the compensation is the Act of 1897, section 1 (1): "If in any employment to which this Act applies personal injury by accident, arising out of and in the course of the employment, is caused to a workman, his employer shall be liable to pay compensation." Section 7 (1) says: "This Act shall apply only to employment by the undertakers on or in or about" (*inter alia*) a factory." Section 7 (2) says: "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891; and also includes" (*inter alia*) "any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," and "'undertakers' in the case of" (*inter alia*) "a factory means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895"; and "'workman' includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise" . . . "Any reference to a workman who has been

(1) [1901] A. C. at p. 413. (2) [1901] A. C. 79.

injured shall, when the workman is dead, include a reference" (*inter alia*) "to his dependents"—a term which includes the applicant Mary Hanlon.

The Factory and Workshop Act, 1895, is by section 56 to "be construed as one with the Factory and Workshop Acts, 1878 to 1891," and those Acts and that Act may be cited collectively as the Factory and Workshop Acts, 1878 to 1895."

Section 23 (1) of the Act of 1895 enacts (*inter alia*): "The provisions of the Factory Acts with respect to accidents . . . shall have effect as if . . . every dock . . . were included in the word 'factory' . . . and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof, shall be deemed to be the occupier of a factory."

These enactments, which I have quoted in part, contain references to other things than docks, and they contain provisions referring to machinery, and to mechanical power, and to divers operations and processes. But these references or provisions do not qualify or alter the effect of the provisions which I have quoted *verbatim*, and which are, in themselves and by themselves, continuous, complete, and intelligible. These other references and provisions are independent, additional, or alternative, and the liability of the employers of workmen in or about docks must be determined by the provisions about docks, and out of those provisions I cannot get Hanlon's case.

The Act of 1895, section 23 (1), applies the provisions of the Factory Acts with respect to accidents to "every dock," and so brings "every dock" into the definition of "factory" in the Act of 1897, section 7 (2).

If the use by the respondents of the Spencer Dock as a place for keeping their barge, made them the "occupiers thereof," to the extent of the part occupied by their barge, the respondents thereby became "undertakers" within the definition in the Act of 1897, section 7 (2), because the Act of 1895, section 23 (1), enacts that for the purpose of the enforcement of the provisions of the Factory Acts with respect to accidents . . . the person having the actual use of a dock . . . or of *any premises . . . forming part thereof* shall be deemed to be the occupier of a factory."

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If I had to interpret these words for myself, I could not avoid applying them to the actual use of part of a dock as the site of a floating barge; and Hanlon lost his life by falling from the barge of the respondents while he was employed on it by them in the dock, part of which it then occupied. With nothing to follow but the thread of legislation, which I have so far tried to unravel, I should feel myself inevitably led to the conclusion that the award in this case was right, and that the appeal must be dismissed with costs. But it is right to add that, laying aside some earlier and narrower decisions of the English Court of Appeal, which have been either reversed or disapproved by the House of Lords, the three cases of *Raine* v. *Jobson* (1), *Bartell* v. *Gray* (2), and *Cattermole* v. *Atlantic Transport Co., Ltd.* (3), lead to the same conclusion. They establish the propositions that the occupation of a berth in a dock by a vessel is the actual use or occupation by the owner of that vessel of "premises within the dock or forming part of it"; that the immunity given to persons "interested in seafaring adventure" does not extend to accidents happening in or upon a vessel in a dock, when the owners of that vessel are engaged in some business for which they require the use of a dock; and when in the course of that employment one of their workmen is injured, that under such circumstances the part of the dock occupied by the vessel is a "factory" within the meaning of the Acts; and that a workman who loses his life in, from, or about such a vessel is "killed by an accident in a factory." Lastly, they establish that employers, having the actual use of such a vessel in a dock for a purpose of their own, are "undertakers" within the meaning of the Acts.

These propositions, and the language of the Lords and Judges by whom they were laid down in these three cases, are, to my mind, irreconcileable with the contention of the present appellants.

WALKER, L. J.:—

The appellants, the North City Milling Company, are the owners of barges, which are used by them for bringing cargo to or from vessels in the river Liffey, *i.e.* from the quay of the

(1) [1901] A. C. 404. (2) 18 *Times* L. R. 70. (3) *Ib.* 102.

Spencer Dock to vessels, or to that quay from vessels in the river. The Spencer Dock is a wet dock, supplied with water on the land side from the canal, and on the sea side from the Liffey. The deceased Hanlon was in the appellants' employment as labourer, and his duty was to do such work as he might be directed in the way of loading or unloading from the quay into the barges, or to go with a barge into the river to obtain cargo from a vessel and bring it to the quay of the dock. The barges are kept moored in the dock, and he was drowned when engaged in preparing to bring a barge from its place in the dock to a vessel.

His widow claims compensation; and the question we have to decide is whether her case comes within the Workmen's Compensation Act, 1897—an Act which, from the mode in which it has been drafted, has given occasion to much litigation and considerable conflict of judicial opinion. The Act of last Session, 1 Ed. 7, c. 22, which came into force on 1st January, 1902, consolidates and amends all the Factory Acts. Whether sections 104 and 105 of it produce any alterations in the case is not material for us to consider.

The general object of the Workmen's Compensation Act is to make an employer liable to provide compensation for a workman injured in his employment; but the workman entitled to receive compensation, and the employer to be liable for it, and the kind of work in respect of which it is to arise, are all the subject of definition. A "workman" is a person who is engaged in an employment to which the Act applies, whether by way of manual labour or otherwise. The idea of machinery does not necessarily enter into it. The employment, confining ourselves to the subject we have to deal with, is employment by the "undertakers" on, in, or about a "factory," and "undertakers" in the case of a "factory" are the occupiers of it within the meaning of the Factory and Workshop Acts, 1878–1895.

The material questions which we have to consider are, whether Spencer Dock is a "factory" within the legislation, and whether the appellants are the occupiers of it.

One's first idea of a "factory" would be a place in which there was employed mechanical power, by use of steam or the like, and in the Factory Act of 1878 this was so; but the Factory

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Act of 1878 also deals with workshops in which mechanical power may not be used, and in which manual labour only is employed, if it be exercised by way of gain or the making of an article for sale; and so a "shipbuilding yard," which is also legislated for in it, may be either a factory or workshop according as mechanical power is used in it.

The Factory Act of 1895 extended the legislation considerably; for instance, the 18th section, which requires notice of practically every injury to an employé occurring in a factory or worshop to be given, and the 23rd section applies five named provisions of the factory code to new subjects, which are in no sense factories within the Act of 1878, as if they were included in the word "factory."

Amongst the provisions applied are the provisions of the Factory Acts with respect to accidents, and section 68 of the Act of 1878 with respect to the powers of inspectors, and amongst the new subjects we find "every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process."

This last provision constitutes the machinery and plant, a factory within a factory—see *M'Nicholas* v. *Dawson* (1)—and the same section further enacts that "for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory." It will be observed that the "Factory Acts" in the Act of 1895 are defined to be the Act of 1878, the Act of 1891, and the Act of 1895 itself—an observation which gets rid of a verbal difficulty which might be suggested on the language of the earlier part of the section.

Thus the Act of 1895 did not make those new subjects factories, but applied to them certain provisions of the code as if they were such; but the Workmen's Compensation Act actually includes them within the word "factory" by the definition. It

(1) [1899] 1 Q. B. 773.

says: "Factory has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the 'Factory Acts' is applied by the Factory and Workshop Act, 1895." "The Factory Acts," as I have observed, include the Act of 1895 itself. There is no doubt that there are several decisions of the Court of Appeal in England which would compel us to decide this case against the respondent if they were still to be considered binding; for instance, *Flowers* v. *Chambers* (1), where it was held that a man employed on a ship lying in a dock was not employed on, in, or about a dock within the meaning of the Act. So too *Henessey* v. *M'Cabe* (2), where the employers were held not to be liable on the ground that a barge which was in the water of the dock, and from which goods were being discharged, which were never landed at all, was not a dock within the Act. Collins, L.J., concurred with difficulty, as (he said) the statute was so drawn that it was difficult to discover what it really meant; and it was not easy to deal with it upon the broad ground of common sense: adding that the contention for the workman was logical on the words of the section, though he did not adopt it. *Spencer* v. *Livett* (3) followed that decision.

The case of *Merrill* v. *Wilson* (4) is the first of a series of decisions the other way. It was there held that the quay was a "factory," and that the shipowners were undertakers of it, as they occupied a definable portion of it for the use of their ship moored alongside. So the authorities stood up to the case of *Raine* v. *Jobson* (5), decided in the House of Lords on 24th June, 1901.

Jobson & Co. engaged a berth in a dry dock for the purpose of inspecting and cleaning their ship. Raine was a labourer employed in cleaning the ship's bottom. There was no loading or unloading going on, and no machinery was used. Raine was passing from the ship to the quay by a gangway when he fell into the dock. The Court of Appeal decided against the claim, following *Flower* v. *Chambers* (1), *Henessey* v. *M'Cabe* (2), and *Spencer* v.

(1) [1899] 2 Q. B. 142.
(2) [1900] 1 Q. B. 491.
(3) *Ibid.* 498.
(4) [1901] 1 Q. B. 35.
(5) [1901] A. C. 404.

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Livett; (1) but the House of Lords reversed that decision. The appellant's counsel contended that the dock was a factory, though the ship was not, and that the employers were occupiers of a portion of it within *Merrill* v. *Wilson* (2). The employers' counsel admitted that by the combined effect of the Acts the dock was a factory, but contended that the respondents were not occupiers of it. Lord Halsbury says (p. 410):—"Assuming a dock to be within the statute—and as to that we had a very frank and proper admission that this dock is under the Act 'a factory' within the meaning of the Act—here is a man killed by an accident in a 'factory,' the factory being a dock, and the accident happened in the course of his employment while he was so employed in the dock by the persons who had hired the dock for the purpose of their trade. My Lords, I am not at present able to follow the train of reasoning by which the respondents sought to suggest that because the wooden structure which was inside the dock and to which the work was being applied was a ship which when floated into the sea would be capable of being treated as a separate entity, and would be free from the operation of the Act generally, that conveys to the dock in which the ship is placed the immunity which the ship itself would possess if sailing on the high seas. Why that should be so I am wholly unable to understand. The place or thing that is being used, the dry dock, is not at sea—it forms no part of that subject-matter to which this artificial immunity is given by the statute, but it is an ordinary piece of machinery intended for the purpose of repairing ships, of which machinery these defendants are in occupation I should say, but at all events have the use of it in and about it."

Lord Macnaghten deals with both branches of the argument. He says (p. 411):—"If you translate the account of the accident from ordinary language into the phraseology of the statute, it seems to come under the very words of the enactment. The dock was a 'factory,' because it was a dock to which some 'provision of the Factory Acts is applied by the Factory and Workshop Act, 1895.' Messrs. Jobson were 'undertakers,' because they had at the time

(1) [1900] 1 Q. B. 498. (2) [1901] 1 Q. B. 35.

the 'actual use and occupation' of the dock. The accident happened to a workman in the dock, and it was an accident 'arising out of and in the course of' his employment. I agree with Mr. Ruegg that it is difficult, if not impossible, to reconcile the case of *Merrill* v. *Wilson* (1) with *Flowers* v. *Chambers* (2). Of the two I prefer the latter case."

Lord Shand is more emphatic. He says (p. 412):—"It cannot be disputed—indeed it has not been disputed—that the dock in question is a 'factory' within the meaning of the Workmen's Compensation Act, 1897, section 7. That statute provides that a 'factory' in the Act 'has the same meaning as in the Factory and Workshop Acts, 1878 to 1891,' and 'includes any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Acts, 1895.' Various provisions of these Factory Acts have been shown to be applied by the Factory and Workshop Act of 1895, and there is therefore no question that this dry dock is a 'factory.'"

Lord Lindley adds—"I do not see how to get out of the language of the two sections: section 7 of the Act of 1897, coupled with section 23 of the Factory and Workshop Act of 1895."

The two questions which we have to decide arose directly in the case of *Bartell* v. *Gray* (3). There the applicant was a ship-painter employed by a firm of contractors who had the job of painting a steamship lying alongside a wharf, and had possession of the ship so far as necessary for the work to be done. It was held that the applicant, who was working on a ship in a dock, was working in a factory; and, secondly, that the employers had the use of the ship for their job, and therefore of the dock. The Master of the Rolls says—"The ship was in a dock, and therefore the person in occupation of the ship would be the occupier of a dock or of a part thereof"; and he sums up:—"There was here actual use and occupation of a given subject-matter which was capable of being defined in regard to space, and which was therefore a factory."

All the cases again came under review in *Cattermole* v. *Atlantic Transport Company* (4). There the workman was in the

(1) [1901] 1 Q. B. 35.
(2) [1899] 2 Q. B. 142.
(3) 18 *Times* R. 70.
(4) 18 *Times* R. 102.

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employment of the respondents, who were owners of a steamship lying alongside a quay which was taking in cargo from a schooner alongside of her by means of a derrick. The main point argued was whether the ship being in a wet dock, the decision in *Raine* v. *Jobson* (1) was to be applied.

Lord Justice Stirling says in his considered judgment:—"The question is, whether we ought to follow the decision in *Flowers* v. *Chambers* (2) or that of the House of Lords in *Raine* v. *Jobson* (1). In *Flowers* v. *Chambers* (2) it was held by this Court that a workman employed on a ship lying in a wet dock was not employed on, in, or about a dock within the meaning of the Act. In *Raine* v. *Jobson* (1) the House of Lords determined that a workman employed on a ship lying in a dry dock was employed on, in, or about a dock within the meaning of the same Act. Now the Act speaks of a dock in general terms without reference to whether it is wet or dry; *prima facie* therefore the two decisions are inconsistent, and that of the House of Lords ought to be followed. This view is confirmed when the *ratio decidendi* in the two cases is examined. In *Flowers* v. *Chambers* (2) the late Master of the Rolls said:—'If the Legislature had intended that ships should be brought within the purview of the Act, it would have been perfectly simple to have put the word "ship" in the section. They have, however, chosen certain words expressive of certain localities to which the application of the Act is limited, and a ship is not one of them.'" Against this passage from the judgment in *Flowers* v. *Chambers* (2) the learned Judge quotes, from *Raine* v. *Jobson* (1), the passage I have already read from Lord Halsbury's judgment, and having read it, he states that in his opinion the decision of the learned Judge who had awarded compensation in *Cattermole* v. *The Atlantic Transport Company* (3) on this point could not be disturbed.

In my opinion, from those later authorities, and I take refuge in them from the obscure legislation, it follows (*a*) that the mere employment of machinery is immaterial; (*b*) that a man employed on a ship lying in a wet dock is employed in a factory; (*c*) that the owners of the ship occupy the wet dock by the definable space

(1) [1901] A. C. 404. (2) [1899] 2 Q. B. 142. (3) 18 *Times* R. 102.

in which the vessel lies; and it seems to me a matter of degree only and not of principle that the vessel is a barge and not a sailing or steam ship.

For these reasons, I think that the appeal should be dismissed.

HOLMES, L. J.:—

I think that the Recorder decided in this case that the provisions of the Workmen's Compensation Act, 1897, apply to employment in every dock irrespective of its character or the purpose for which it is used. This, at all events, was the principal question of law argued on the hearing of the appeal; and if it is determined in favour of the respondent, no other ground was relied on for depriving him of compensation.

I have had an opportunity of reading the judgment delivered by Fitz Gibbon, L.J., and while I am in complete agreement with the conclusion arrived at by him, I doubt if I had been obliged to construe the statute without the assistance of decisions which I regard as binding on this Court, whether the solution of the question would have appeared to me so simple as he has found it.

It is, I think, difficult for anyone reading the 7th section of the Act of 1897 to believe that the draftsman thought that he was thereby extending the Act to employment in every dock. If this was his intention, why did he not say so clearly and simply? Why, after providing that the Act should apply to employment in a factory, did he say that factory has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895? If language is taken in its ordinary sense, these words imply that only docks of a particular class are included; and if I turn to the 23rd section of the Act of 1895 I find it at least capable of a construction in accordance with this view. This is the only section that applies any of the provisions of the Factory and Workshop Acts to a dock, and the mode in which this is effected is by declaring that certain of those provisions shall have effect as if every dock was included in the word "factory." If the intention was to apply these provisions to all docks, it must strike one that this is a curious way of carrying it out; and I cannot help thinking that

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there was some object in using this peculiar form of language. The key might possibly be supplied by the circumstance that the word "factory" in those Acts has a restricted and carefully defined meaning. The definition is found in the 93rd section of the Act of 1878, where it will be seen that premises to constitute a factory must fulfil certain specified conditions. If in this glossary the word "factory" is to include and to be read a dock, it is difficult to escape the conclusion that the only docks brought within the applied provisions are docks that comply with the same conditions. This may appear an over-refined mode of interpreting a statute; but the legislation is so intricate and artificial as to set at defiance ordinary rules of construction; and I frankly confess that without authority I could not arrive at any conclusion that would be convincing to my own mind. I am satisfied, however, that the proposition—to be found in at least one text-book—that the provisions of the statute of 1897 apply to every dock is justified by recent English decisions. The House of Lords has not, I think, gone as far as this. On the contrary, some of the language of the Lord Chancellor and Lord Macnaghten in *Raine* v. *Jobson* (1) seems to me to leave this an open question. But the English Court of Appeal in *Bartell* v. *Gray* (2) and *Cattermole* v. *The Atlantic Transport Company, Limited* (3), undoubtedly adopts this view; and I should hesitate under any circumstances to differ from a decision of a Court having a jurisdiction corresponding to our own. On this occasion, however, I am under no temptation to do so, inasmuch as the construction arrived at is not only possible, but probably more free from difficulty than any other.

Having reached this point, it follows from other decisions that the view of the Recorder ought to be affirmed in all other respects.

If the dock is a factory, the inevitable consequence is that boat, barge, or vessel floating in it is part of a factory, and the owners who have secured the right to occupy a berth in the dock by such vessel are undertakers within the meaning of the Act.

Solicitor for the appellants: *Greene.*
Solicitor for the respondent: *Morgan.*

G. Y. D.

(1) [1901] A. C. 404. (2) 18 *Times* L. R. 70. (3) *Ibid.* 102.

COLHOUN *v.* KNOX (1).

K. B. Div. 1902. Dec. 12.

Civil bill decree—Amount recovered for debt under £20—Addition of costs, bringing up amount recovered to over £20—Renewal—Removal into High Court—Certiorari—27 & 28 *Vict. c.* 99.

Where a civil bill decree has been obtained for a debt under £20 with costs, bringing the amount recovered to a sum exceeding £20, and renewed by a decree not specifying the respective sums recovered for debt and costs, the renewal decree cannot be removed into the High Court of Justice by *certiorari*, under 27 & 28 Vict. c. 99.

MOTION to discharge an order, dated the 15th October, 1902, giving liberty to the plaintiff to issue a writ of *certiorari* to remove into the High Court "a civil bill decree obtained by the plaintiff against the defendant on the 10th April, 1902, for the sum of £20 7*s.* 8*d.* debt and 6*s.* costs. The plaintiff had sued the defendant Margaret Knox, as administratrix of S. Knox, deceased, by a civil bill, for £18 19*s.* 10*d.*, goods sold and delivered to the deceased; and had, on the 17th January, 1901, obtained a decree in the Co. Tyrone County Court, for debt, £16 10*s.* 2*d.*, and costs, £1 3*s.* On appeal to Assizes it was ordered (9th March, 1901), "that the said decree be affirmed and changed into a decree *de bonis testatoris*, and that the said plaintiff do recover from the goods and chattels of the said S. Knox, deceased, coming to the hands of the defendant, the sum of £20 7*s.* 8*d.*, being the amount of the said debt and of the said plaintiff's costs in the Court below and costs of said appeal." The affirmance set out the particulars (in the usual form) below: "Debt, £16 10*s.* 2*d.*; costs in Court below, £1 3*s.*; costs of appeal, £2 14*s.* 6*d.*; total, £20 7*s.* 8*d.*" On the 10th April, 1902, the plaintiff obtained a renewal in the County Court of this decree as affirmed. The renewal order was in the following terms:—"It appearing upon oath being made in open Court that there

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

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remains still due by the annexed decree of affirmance *de bonis testatoris* the sum of £20 7*s.* 8*d.*, for goods sold and delivered by plaintiff to deceased in his lifetime, and also by settled account between said plaintiff and defendant, it is therefore ordered and decreed by the Court that the same be and the same is hereby renewed for that sum, together with the sum of 6*s.* costs and expenses of this renewal, and that the plaintiff shall have and recover from the goods and chattels of the said S. Knox, deceased, coming to the hands of the defendant the same, and the several sheriffs, etc." "Debt, £20 7*s.* 8*d.*; costs, 6*s.*; total, £20 13*s.* 8*d.*"

On the 10th October, 1902, the plaintiff applied for and was given liberty to remove the renewal decree by *certiorari* into the High Court. In the affidavit grounding the application the plaintiff deposed that the defendant had no goods of the deceased that could be taken to satisfy his claim; but that she was entitled as administratrix of the deceased to a fund which might be made available under a garnishee order; he referred to and exhibited the renewal decree of 10th April, 1902. The original decree, affirmance of March, 1901, was apparently not then forthcoming. Upon this application it was ordered "that the plaintiff be at liberty to issue a writ of *certiorari* to remove into this Court a civil bill decree obtained by the plaintiff against the defendant on the 10th April, 1902, for the sum of £20 7*s.* 8*d.* debt and 6*s.* costs," and costs of the motion. The writ of *certiorari* was issued, dated the 20th November, 1902; and the defendant now moved to discharge with costs the order of the 15th October, on the ground that it was obtained irregularly, the debt for which the original decree was made being under £20; and on the further ground that the affidavit on which the order for *certiorari* was obtained had not disclosed the facts to the Court.

P. Law Smith, for the defendant.

Cuming and *A. Todd*, for the plaintiff.

PALLES, C. B.:—

We are of opinion that this renewal was not within the Act of 1864 (27 & 28 Vict. c. 99) inasmuch as it was not for "an amount exceeding £20 *exclusive of costs.*"

We think that it must be read as if it had commenced with a recital of the decree, "whereas a decree had been obtained for £16 10*s.* 2*d.*, and £3 17*s.* 6*d.* for costs, making together £20 7*s.* 8*d.*" Following that recital, the order is, that the *same*, that is the decree for £16 10*s.* 2*d.* and £3 17*s.* 6*d.* for costs, shall be renewed for the full sum. We are of opinion that the procedure, by way of renewal, the object of which is to enable execution to be issued, notwithstanding the lapse of the statutable period, does not change the character of the sum recovered from costs into debt. The order of the 15th October will consequently be discharged with costs.

ANDREWS and JOHNSON, JJ., concurred.

Solicitor for the plaintiff: *John Elliott.*
Solicitor for the defendant: *W. P. Moody.*

A. E. R. J.

REX (O'MALLEY) *v.* WESTPORT URBAN DISTRICT COUNCIL (1).

Appeal. 1902.
Oct. 30, 31. Nov. 25.

Local Government Act—Existing officer—Poor-rate collector—Public Health Act, 1878, *sect.* 7—*Urban sanitary district, formed subsequently to Local Government Act—Provisional Order—Loss of income—Compensation.*

At the time of the passing of the Local Government Act O'M. was a poor-rate collector for the electoral division of Westport, in the county of Mayo. This electoral division consisted of two parts, the rural electoral division and the urban electoral division. By virtue of the passing of the Act O'M. became an existing officer of the Mayo County Council. In November, 1899, subsequently to the passing of the Local Government Act, the Town Commissioners of Westport obtained a Provisional Order (which was subsequently confirmed by statute), whereby the town of Westport was formed into an urban sanitary district, in pursuance of the provisions of the Public Health Act, 1878. They advertised for a rate collector for the newly constituted urban sanitary district. O'M. offered to collect the rates for 7*d.* in the £1, and H. offered to act as

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

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THE KING (O'MALLEY) *v.* WESTPORT D. C.

collector for a smaller salary. H.'s offer was accepted, and O'M. applied to the council of the urban sanitary district for compensation for loss of office. The council refused. O'M. then applied to the King's Bench Division for a mandamus to direct the council to award him compensation :—

Held (affirming the decision of the King's Bench Division), that the loss of income was not a consequence of the passing of the Local Government Act, and that O'M. was not entitled to compensation.

On the 6th November, 1879, William O'Malley was appointed poor-rate collector by the guardians of the Westport Union for the electoral division of Westport, and in the month of January, 1880, he was appointed by the said Board poor-rate collector for the electoral divisions of Aillemore, Bundorha, Drummin, Emlagh, Kilgeever, Kilsallagh, Louisburgh, and Owenadornaun. He continued in the said office for these electoral divisions up to the date that the Local Government Act came into operation, and was an existing officer within the definition of the statute.

On the 1st October, 1900, portion of the area comprising this collecting district, namely, the electoral division of Westport, was formed into the Urban District of Westport under the Public Health Act, 1878.

Previous to, and at the time of, the passing of the Local Government Act, the Westport electoral division was divided into two divisions, namely, the rural electoral division of Westport and the urban electoral division of Westport. The said electoral division of Westport included the town of Westport, which is situated in, and formed part of, the rural district of Westport, in the administrative county of Mayo. The town of Westport was a town, having commissioners, under the Towns Improvement (Ireland) Act, 1854. By a Provisional Order of the Local Government Board, dated the 14th November, 1899, which was confirmed by the Local Government Board (Ireland) Provisional Order Confirmation (No. 1) Act, 1900, it was ordered and directed that the said town of Westport should be separated from the rural district of Westport, and should be constituted an urban sanitary district, subject to the provisions of the Public Health (Ireland) Acts, 1878 to 1896, as amended by the provisions of the Local Government (Ireland) Act, 1898, affecting urban sanitary districts.

In October, 1900, O'Malley served upon the Urban District Council a letter expressing his willingness to serve and continue in office as rate collector for the said Urban District Council.

Under these orders it devolved on the Westport Urban Council to collect the poor-rate within their districts, which previously they had never done. Up to that they levied and collected a town rate only, and one Thomas Hoban had for many years collected the same; but on the 13th November, 1900, they caused an advertisement to be inserted in the local newspapers for a rate collector for the said Westport urban district, to be appointed on the 3rd December, 1900, in order that the poor-rate might be collected by them in the most economical and efficient manner. On the 3rd December, 1900, William O'Malley wrote to the Urban District Council, offering to act as rate collector, at the remuneration of 7*d.* in the £; but this remuneration was deemed by them too high; and as Hoban at the same time offered to collect at 2½*d.* in the £, the Westport Urban Council appointed Hoban.

O'Malley then applied to the King's Bench for a mandamus, directed to the Westport Urban District Council, directing them to proceed to take into consideration and determine the claim of O'Malley on account of his emoluments as poor-rate collector for such portion of the electoral division of Westport as was now included in the urban district of Westport; and further to consider and assess the amount of compensation, pension, or gratuity to be paid to O'Malley as an existing officer within the meaning of the said statute, by reason of his not being continued in said office.

On the 6th June, 1902, the King's Bench Division allowed the cause shown against the conditional order, and discharged the order.

William O'Malley appealed.

Fetherstonhaugh, K.C. (with him *Campbell, S.-G.*, and *J. O'Connor*,, for the appellant :—

The appellant was an existing officer employed by the County

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Council. His rights as an existing officer depend upon whether he was retained by the County Council or not; if he was, he should get the same pay as before; if not, he should get compensation: s. 115, sub-sect. 18; *Rex* (*Ruane*) v. *Ballina District Council* (1); *Rex* (*Wray*) v. *Antrim County Council* (2); *Rex* (*Harvey*) v. *Lisburn Urban Council* (3). The case is within s. 120 of the English Local Government Act. The Local Government Act created the machinery whereby this urban sanitary district was constituted. Unless the Local Government Act had passed it could not have been done; and it is stated on the face of the Provisional Order that it was done under the sections and powers of the Act. The Order provides that vested interests shall be preserved, as under the Local Government Act.

Harrison, K.C., Healy, K.C., and *Powell*, for the respondents:—

The appellant is not entitled to any compensation upon two grounds—1. It was not in consequence of the Local Government Act that the appellant has suffered loss. It was in pursuance of the provisions of the Public Health Act that this place was constituted an urban sanitary district, and not under the Local Government Act, or in consequence of its being passed. 2. If it was, there is no remedy under the Local Government Act. Section 115 is one of the transitory provisions, and the cases with which it deals are those of officers existing at the passing of the Act. If the appellant was aggrieved, the remedy should have been provided by the Provisional Order. The appellant never was our officer at all.

Nov. 25.

LORD ASHBOURNE, C.:—

In this case Mr. O'Malley, a poor-rate collector of the county of Mayo, applied for a mandamus to the Urban District Council of Westport commanding them to hear and determine his claim for compensation for loss of emoluments he has sustained, as poor-rate collector, under the circumstances stated in his affidavit. He applied to the King's Bench Division, who thought they were bound by *Ruane's Case* (1) to decide against the claim, and accord-

(1) 35 I. L. T. R. 71. (2) 2 New Ir. Jur. 109. (3) *Ibid.* 191.

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ingly, they allowed the cause shown against the conditional order, and therefore this appeal was brought.

The facts of the case are short, and there is no doubt about them. It appears that O'Malley was at the time of the passing of the Local Government Act a poor-rate collector for the electoral division of Westport, and by virtue of the passing of the Act he became an officer of the County Council, who did nothing to interfere with his rights. But the town of Westport, which had town commissioners under the Towns Improvement Act for some years before the passing of the Local Government Act, took proceedings, subsequently to the passing of the Local Government Act, under section 7 of the Public Health Act, 1878, to have the town and district constituted an urban sanitary district, and that was done by Provisional Order on the 14th November, 1899, and it was ultimately carried out by statute.

That, of course, caused a transfer to the new district council of all the duties with reference to rates, and what the district council did was this—they had previously in their employment a man who collected their town rates, and they continued him in the position for the purpose of collecting the rates of the new urban district. Mr. O'Malley then claimed from the urban district council compensation for withdrawing from him the collection of the part of the rates included in the new district. They said No—we continue our own officer who has served us for years, and whose tender, besides, is far lower than yours, and we refuse to recognise your claim. I do not discuss the *quantum* of the loss of Mr. O'Malley; that is not the point. There is no one to blame in the business. The County Council has done absolutely nothing that would entail loss on O'Malley. The District Council are not to be blamed; they proceeded under the procedure in existence for twenty years under the Public Health Act; and when they advertised for tenders for collecting the rates, O'Malley put in a tender for 7*d.* in the £, and their own collector put in a tender for 2½*d.*, and they not only chose the man who was their own collector, but also on the ground of economy.

O'Malley was not transferred to the Urban District Council under the Local Government Act. The Local Government Act does not refer to such a transfer made subsequently to the passing of the

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Act, and when we look at section 115 it will be found no substantial contention can be raised to show that O'Malley is entitled to relief under it. The proceedings by the District Council to be made an urban sanitary authority were not taken under the Local Government Act. It was a proceeding which might have been taken years before, or might be taken years hence; therefore, as the case stands on the facts, this District Council have proceeded under the mechanism of the Public Health Act—an Act passed twenty years ago, before 1898, and have constituted themselves an urban sanitary authority; and there is nothing to bring O'Malley into any privity with them, which would onerate them with any liability in his favour.

The King's Bench thought that they were bound by the decision in *Ruane's Case* (1). I think that they were right, and I think that the decision in that case was a sound decision.

It was said that this was a case of hardship: that may possibly be so to some extent; but I wish to point out that if a clear case is made out in which a man is entitled to consideration for loss, it might have been presented when the Provisional Order was being framed. In my opinion, the judgment of the King's Bench was right, and should be affirmed, and the appeal dismissed with costs.

FITZ GIBBON, L. J.:—

I concur in the result arrived at by the Lord Chancellor, and in the reasons which he has given. I therefore confine myself to stating the principle of my judgment.

The loss of income here—if there was any—was not a consequence of the passing of the Local Government Act. It was the result of a matter which occurred subsequently; namely, the confirmation by Parliament of the Provisional Order which constituted the Westport District Council an urban sanitary authority, and the exercise by that authority of its statutory powers. I cannot bring subsequent matter into the compensation provisions of the Local Government Act, nor give to an officer whom that Act did not injuriously affect, compensation for the

(1) 35 I. L. T. R. 71.

effect of other and subsequent legislation, from which similar provisions were omitted.

Before the Act, or if it had never passed, the remuneration of a poor-rate collector might have been reduced in several ways, without giving him any right to compensation: *e. g.* the area of his collection might have been altered, and he might even have been deprived thereby of the most profitable part of his work. After the Act passed he remained liable to be affected by subsequent legislation; it was the duty of the Local Government Board when framing the Provisional Order to see that it did no injustice, and to consider any claim which the collector might have made for protection or confirmation. But the omission to do so cannot bring a case under the Local Government Act, which has really arisen under the subsequent Provisional Order, which has now become law.

WALKER, L. J.:—

Mr. O'Malley was an existing officer, who was transferred by the Local Government Act to the County Council of Mayo, and he was duly employed by that Council under a scheme settled by it, and was taken over by that Council as an officer and a salary assigned to him. Matters so remained for about a year, when, under the provisions of an Act of Parliament confirming a Provisional Order, a portion of the area in which he collected rates was assigned to the Urban District Council of Westport. That Council did not take over O'Malley for so much of their area, because they had an officer of their own, who was not only an old officer, but who would collect their rates more economically.

It is contended that O'Malley, under sect. 28 and sect. 115, sub-sect. 18, and the incorporated sect. 120 of the Local Government Act, 1888, is entitled to recover compensation from the Urban District Council.

The authority under which the respondents became an urban sanitary district is derived from the 7th section of the Public Health Act, 1878, by which the Local Government Board are empowered by Provisional Order to separate from a rural sanitary district any town or district wholly situate therein in which there shall be town commissioners under any Act of Parliament,

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irrespective of the number of inhabitants, and to constitute it an urban sanitary district. This rendered necessary an application to Parliament; and the 4th section of the Local Government Act, 1898, removes the necessity of applying to Parliament when no petition of the kind specified against the making of the Order is received within three months. In the present case such a petition was received; and accordingly it became necessary to go through the forms required by the 7th section of the Public Health Act, and an Act of Parliament confirming the Provisional Order became law on the 10th July, 1900.

The Urban District Council, being thus constituted, elected to retain their old officer to collect their rates. In my opinion this state of facts did not bring the applicant within the class of those entitled to compensation under the Local Government Act and the incorporated legislation.

It is not contended that he was entitled to compensation from the County Council of Mayo, to whom he was transferred by the Act as an existing officer; but it is said he is as against the new body formed under other legislation a year afterwards. Three conditions must exist: (1) he must be an existing officer when the Local Government Act passed; (2) he must suffer pecuniary loss by virtue of the Local Government Act or something done in pursuance of or in consequence of it; (3) there must be paymasters who are designated "the council to whom the powers of the authority, whose officer he was, are transferred under the Local Government Act"; unless these conditions exist he is not entitled to the statutory compensation. I think the applicant fails to show that the conditions 2 and 3 exist. I do not think he has suffered loss by virtue of the Local Government Act or anything done in pursuance or in consequence of it. What is contemplated is a direct effect of the Local Government Act, and the action of the council who directly take over the existing officer and interfere with his emoluments by their own action, or by the necessity of the case growing directly out of the transfer to such council. If what was done under section 7 of the Public Health Act attracts the right to compensation, such right might arise ten years after the Local Government Act passed, and after the officer had become one who in many cases the County

Council might dismiss at pleasure. I do not think the Urban District Council are the Council to whom the powers of the authority whose officer he was are transferred under the Act: neither the particular officer or body or transfer within the words exist. The stage had been long passed at which the obligation would arise.

A second body had arisen by virtue of an Act of Parliament, not within the section; and under section 275 of the Public Health Act that second body would be bound to compensate their own officer if they passed him over.

It is not necessary for the respondents to show the existence of a remedy; but I think section 42, sub-section 3, of the Local Government Act meets the case when it enacts that the Order shall contain such provisions as are necessary for making an adjustment of property, rights, and liabilities; and under these words the applicant might have applied to Parliament to make provision for his case before the Provisional Order was made law. It was also argued that as the creation of the Urban Council attracted the provisions of the 28th section, by which an Urban District Council is given the power and duty of collecting the poor-rate, this brought into operation the words "in pursuance of or in consequence of this Act." This second argument is really subject to the infirmity which affects the first. It is the formation of the Urban District Council which causes the change under which the applicant suffers loss, if he does so, which is more than doubtful if you compare his position with that when the Local Government Act passed.

The case of *Rex* (*Ruane*) v. *Ballina Urban District Council* (1) is an authority precisely in point; and though we are at liberty to differ from that decision if we think right, I decline to do so, being of opinion that it is in all respects correct.

HOLMES, L. J. :—

A few sentences will be sufficient to state the position of the relator and the ground on which he seeks a writ of mandamus.

Up to the time of the passing of the Local Government

(1) 35 I. L. T. R. 71.

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(Ireland) Act, 1898, Mr. O'Malley was one of the poor-rate collectors of the Westport Union; and he thereupon became an officer of the County Council, with all the rights conferred by that statute upon a person in his position. No change was made in his duties by the County Council, which continued to employ him as rate collector in the area within which he had previously acted; and, as his remuneration was greater than before, no question of compensation then arose. This area included the electoral division of Westport, portion of which consisted of the town of Westport, having commissioners under the Towns Improvement (Ireland) Act, 1854; and, soon after the passing of the Local Government Act, proceedings were taken under section 7 of the Public Health (Ireland) Act, 1878, to constitute the town of Westport an urban sanitary district, resulting in a Provisional Order for this purpose, dated the 14th November, 1899, and confirmed by statute in the following year.

A consequence of this, taken in connexion with the 28th section of the Act of 1898, was to transfer to the council of the new urban district the business of making, levying, collecting, and recovering the poor-rate within its area—work previously done by the County Council through O'Malley; and although he offered to continue to give his services, the Urban Council appointed as its collector the person who had been collecting the town rate, and who was willing to accept a much lower scale of remuneration. In this state of things O'Malley claimed compensation from the Westport Council for the loss of income consequent on his ceasing to collect poor-rate within its district; and this claim not having been acceded to, he is now trying to enforce it by writ of mandamus. The case presented in the Divisional Court left Palles, C.B., in great doubt whether even the smallest pecuniary loss had been sustained by the relator. It may be safely assumed that since the Provisional Order became operative his emoluments have been considerably less than during the period subsequent to his transfer to the County Council. But I agree with the Lord Chief Baron in holding that the standard of comparison is his position and income as rate collector before the passing of the Local Government Act. This point was only glanced at during the argument; and there may be materials bearing on it which I

have not seen; but there is nothing in the documents supplied by the appellant for the use of the Court to satisfy me that the relator is now in a worse position, either pecuniarily or otherwise, than he was in 1898. I prefer, however, to decide the case on grounds fully discussed by both sides, and involving a principle of general application.

In considering the question of compensation it is important to bear in mind that the creation of Westport as an urban sanitary district was wholly independent of the Local Government Act. The proceedings for this purpose are prescribed by the Public Health Acts, 1878–1896; and although these statutes were amended in one or two trifling details by section 42 of the Act of 1898, they could have been carried out if that section had never been enacted. They might have been taken years hence, or they might never have been taken at all; and the only material change effected by the Local Government Act is, that upon the constitution of an urban district the 28th section transferred to its council the business of making and collecting poor-rate therein. I now turn to section 115, which, with section 120 of the English Local Government Act, is the provision relied on to give Mr. O'Malley a right to compensation in the events that have happened. The first sub-section provides that where the business of any authority is transferred by or in pursuance of this Act to any county or district council, the existing officers of that authority employed in that business shall become the officers of the council of that county or district in like manner, subject to the provisions of this section, as if they had been appointed by that council.

Now, as far as the relator is concerned, this provision admittedly took effect when the Act came into force. The business of the Board of Guardians as a rating authority was transferred to the County Council, and he therefore became an officer of that body. Is it possible to hold that after the operation of the sub-section had been thus apparently completed it is in the circumstances of the present case revived so as to make O'Malley an officer of the Westport Urban Council? The language seems to me to contemplate a transfer both of the business and of an officer of an authority in existence up to the passing of the Act to a

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county or district council created by or in pursuance of it. If so, it has no reference to a subsequent transfer from the County Council to a body called into existence independently of the Act. I should be of opinion that this would be the construction of sub-section 1 even if it stood alone; but I think considerable assistance is given by the subsequent clauses that deal with compensation. Sub-sections 10–15 relate specially to poor-rate collectors; and it appears therefrom that the County Council within six weeks after its first meeting is to submit a scheme to the Local Government Board setting forth its arrangements for the collection of the poor-rate, and the officers they propose to employ for the purpose. It further appears that this scheme is to be the foundation of the right of a transferred poor-rate collector to compensation. If he is not to be employed under the scheme, he is to receive a pension or gratuity in the manner prescribed; and if he is to be so employed, he is to receive remuneration substantially identical with that which he formerly received. It is clear that the relator has no right to compensation under these provisions. The scheme must have been long since settled; and there is no machinery for amending it or framing another. Sub-section 18 has even a closer bearing on the matter under consideration. It begins by declaring that every transferred officer shall hold his office by the same tenure, and upon the same terms and conditions as theretofore. Then follows a provision of great importance—"If, by reason of any alteration of boundary or other thing done by or in pursuance of this Act his duties are increased or diminished, the officer shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine, subject, nevertheless, in cases of diminution to such compensation as is provided by this Act." Here there is contemplated an alteration of area with a consequent diminution of duties; and if this is caused by anything done by or in pursuance of the Act, the officer is to be compensated. This cannot be extended to where the alteration of area is the result of independent legislation unconnected with the Local Government Act.

I may also refer to sub-section 19, which gives special rights to a certain class of officers in case of removal from office within five

years of the date of the transfer—a provision which would lead to great confusion if the section were to be construed as relating to any transfer of officers other than the original transfer from the old authority to the County or District Council

Accordingly, I hold that the claim of the relator cannot be supported by anything to be found in section 115. The only other provision relied on is section 120 of the English Local Government Act, which seems to be intended to cover the right to compensation of every existing officer, whether he has been specifically mentioned or not. It enacts that if by virtue of this Act or anything done in pursuance of or in consequence of this Act an officer suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, he shall be entitled to have compensation paid to him for such pecuniary loss by the County Council to whom the powers of the authority whose officer he was are transferred under the Act. The answer to an argument founded on this section is, that the pecuniary loss (if any) suffered by the relator is neither by virtue of the Local Government Act nor of anything done in pursuance or in consequence thereof.

Taking together all the provisions that have been referred to in the course of the argument, two observations apply to them: (1) compensation is only to be paid by a body to whom the officer is transferred as a consequence of the Act; and (2) the officer is only to be compensated for a pecuniary loss sustained by virtue of the Act or of something done in pursuance or in consequence of it. Both of these conditions are wanting in Mr. O'Malley's case. I therefore come to the same conclusion as that arrived at by the Divisional Court in *Ruane's Case* (1), upon which I do not understand that Palles, C.B., cast any doubt.

Questions of compensation to an officer who sustains loss under the circumstances of the present case ought to be settled by the Provisional Order, or the confirming statute; and, if they contain no provision on the subject, I fear that there is no other remedy.

Solicitor for the appellant: *M. Kelly.*
Solicitor for the respondents: *J. C. Robertson.* R. D. M.

(1) 35 I. L. T. R. 71.

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Nov. 13, 14, 25.

IN THE MATTER OF THE DEFENCE ACT, 1842; THE ORDNANCE BOARD TRANSFER ACT, 1855; THE DEFENCE ACT, 1859; THE DEFENCE ACT, 1860, SO FAR AS INCORPORATED INTO THE DEFENCE ACT, 1842; THE LANDS CLAUSES CONSOLIDATION ACTS AMENDMENT ACT, 1860, SECT. 7, AND THE RANGES ACT, 1891, SECT. 11; AND IN THE MATTER OF AN ARBITRATION BETWEEN H. M. PRINCIPAL SECRETARY OF STATE FOR THE WAR DEPARTMENT AND ALEXANDER A. RICHARDSON, AS TO LANDS TAKEN BY THE SAID SECRETARY OF STATE AT NED'S POINT BATTERY, CO. DONEGAL (1).

Defence Acts—Artillery range and camp—Lands taken compulsorily—Compensation—Other lands of owner injuriously affected—Loss of privacy—Apprehended trespass—Injury to fishery—Injury to incorporeal hereditament.

Where lands are compulsorily taken, under the Defence Code, for use as a camp and artillery range, compensation may be allowed for depreciation in value of other lands of the same owner not taken, resulting from the natural and ordinary use of the lands taken as such camp and range. View taken by the Queen's Bench Division in *Reg.* (*Moore*) v. *Abbott* ([1897] 2 Q. B. 362) adopted.

In estimating such compensation regard may be had to loss of privacy and amenity, and the vulgarization of the neighbourhood, by the establishment of a camp, but not to loss or injury from apprehended trespass by soldiers or their friends to other lands of the same owner. Compensation may be allowed for injury, caused by the nature of the artillery range, to a fishery attached to the ownership of the lands not taken.

Semble, compensation may be allowed for injury to an incorporeal hereditament, such as a several fishery.

THE Principal Secretary of State for the War Department, in whom was vested a battery known as Ned's Point Battery, situate near the town of Buncrana, Co. Donegal, had served on Mr. Alexander A. Richardson, the owner of lands adjoining the battery, a notice stating that under the provisions of the Defence Act, 1842; the Ordnance Board Transfer Act, 1855; the Act

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

22 Vict. c. 12; the Defence Act, 1860, so far as incorporated into the Defence Act, 1842; the Lands Clauses Consolidation Acts Amendment Act, 1860, section 7; and the Ranges Act, 1891, section 11, he required to purchase the lands and hereditaments described in the schedule to the notice, the same having been duly marked out and surveyed, and the taking of the same having been duly authorized as therein mentioned; offering to treat for the purchase of Mr. Richardson's interest in the same; and requiring that the compensation to be paid should be settled by arbitration, and not by reference to a jury. Arbitrators were subsequently duly appointed by the Secretary of State and Mr. Richardson, respectively, to determine the amount of purchase-money and compensation to be paid for Mr. Richardson's interest in the said lands and hereditaments, and also the amount of damage (if any) to be sustained by him by reason of the severing of the lands taken from his other lands, or otherwise injuriously affecting such other lands by the exercise of the powers of the said Acts.

The arbitrators having appointed an umpire, the arbitrators and umpire heard evidence and inspected the lands taken and the adjoining lands; and the arbitrators being unable to agree, referred the matters in dispute to the umpire, who awarded £510 as purchase-money and compensation for the lands taken (comprising 15A. 3R. 6P.), and £1877 as compensation for the injuriously affecting Mr. Richardson's other lands by the exercise of the powers of the above Acts. By an order of the Queen's Bench Division the matter was remitted to the umpire to make his award in the form of a case stated for the opinion of the Court, setting out specifically the various heads of damage under which compensation was awarded and the respective amounts awarded under each head, in pursuance of which order the umpire stated the present case, the material matters in which were as follows:—

Ned's Point Battery and some land adjoining, containing in the whole about five acres, is vested in H. M. Principal Secretary of State for War, who claims unlimited right of using the same for mounting guns, artillery fire, a residence for artillery men, training militia, &c. Evidence was given that the battery was in fact seldom used for firing purposes. It was admitted that the lands now taken from Mr. Richardson would be used for the

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purpose of erecting new works and mounting heavy guns thereon for artillery practice and fire, and for a residence for artillery men, and for training artillery and militia in the firing and use of heavy guns.

Mr. Richardson is seised in fee-simple of the estate and demesne of Buncrana Castle, which adjoins the lands taken, and is also owner of the adjoining foreshore. The castle was always used as a residence either by himself and his family or by gentlemen to whom it was let from time to time at a substantial rent. He is also the owner of a salmon fishery in the Buncrana river, which flows through his estate, and extends some miles along the shore seawards and past Ned's Point. Evidence was given that the usual course taken by salmon coming in from the sea was past the lands taken, and that artillery fire from these lands would have an injurious effect on the fishery. The lands taken include a portion of the foreshore and shore used as a bathing place in connexion with Buncrana Castle, and the taking of the lands would practically shut off Mr. Richardson and persons occupying the castle from the best bathing place on his estate. Evidence was given to prove that the demesne and residence would be injuriously affected (*a*) by interference with said bathing place; (*b*) by artillery fire; (*c*) by the permanent quartering of artillery men; (*d*) by militia and artillery training; (*e*) by the two latter courses, and particularly that last-mentioned, bringing disorderly and objectionable characters about the residence and demesne, and thereby interfering with its privacy and the comfort of the occupiers thereof. Similar evidence was given to prove that Mr. Richardson's other adjoining lands would be injuriously affected by the same causes so as to prevent respectable people taking these lands for building lots.

The umpire arrived at the conclusion that however unlimited in theory may have been the rights claimed by the Secretary of State in respect of firing guns from Ned's Point Battery and quartering and training men there, they were practically limited by the restricted area originally occupied, and could not expand so as to cover the additional lands taken, which comprised an area three times as great and afforded the means of accommodating a much larger number of men, as well as the power of mounting and

firing from much more numerous guns than was possible before; and that it was physically impossible that as much injury could have been caused to Mr. Richardson's adjoining property from the old fort as the increased power placed at the disposal of the War Department by the acquisition of the additional lands would be able to inflict. He awarded the following sums:—

£510 as purchase-money and compensation for the lands taken.

£1547 for injury to the lands of the said Alex. A. Richardson by the user of the ground taken for training and other military purposes, and the consequent depreciation of the value of said lands for building purposes and generally, over and above any injury arising from, or which might arise from or be attributable to, the rights of the Secretary of State for War in the premises originally owned by him, and the full exercise of such rights. As to this item the umpire added, by way of explanation, that he took into consideration only part of the injury caused to the property by proximity of the training ground and the consequent bringing of disorderly and objectionable characters into the neighbourhood, and left out of calculation anything for increased firing of cannon, and that he would have allowed the amount had the question been merely one of a rifle range and camp. He referred to the fact that the distance from the town of Buncrana to Ned's Point by road was nearly double the distance between these places if one goes through Mr. Richardson's lands, and that this tended to produce a great amount of trespass not only of the ordinary kind, but also in its most objectionable form, of disorderly and bad characters loitering about the grounds by day and night; that although the chief annoyance from trespass did not arise from the performance of any military duty, a portion of it did, since military messengers preferred the shortest way; that the trespass complained of was a consequence of the action of the War Department, and was an injury against which the landowner could not protect himself by summoning trespassers, owing to the difficulty of identifying soldiers. He stated that he did not make a distinction between the element of annoyance due to the use of the land taken, and that resulting from the trespass thereby occasioned, nor did he attach a separate value to these elements, considering them to be parts of the same injury, the one being consequent on the other.

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£210 for injury to the said fishery over and above any arising from the original rights above mentioned, £50 of this being for loss of the best netting ground, which was now taken by the War Department, and £160 for injury from increased firing from the lands now taken.

£120 for injury from depreciation in letting value of residence, over and above any arising from the original rights above mentioned. In explanation of this sum the umpire referred to the annoyance caused to the occupants of Buncrana Castle by trespass, and the inconvenience caused by their being partially cut off from the shore, and the loss of the bathing place; but he stated that he allowed the amount chiefly for the injury to the fishery, one of the inducements to taking the house being that a couple of rods on the river were let along with it. He stated that he did not make any separate valuation of the different causes that combined to depreciate the letting value of the residence.

J. F. V. Fitzgerald (with him, *The Solicitor-General*, (*Campbell, K. C.*)), for H. M. Principal Secretary of State for the War Department:—

Where lands are compulsorily acquired under the Defence Acts the owner is not entitled to compensation for the injuriously affecting of his adjoining lands by the use of the lands taken as a camp. The opinion to the contrary expressed by the Judges of the Queen's Bench Division in *Reg.* (*Moore*) v. *Abbott* (1) was not necessary to the decision in that case, and no opinion on the point was given by the Court of Appeal. Even assuming that compensation can be allowed for such injuriously affecting, the mere possibility of trespass on the adjoining lands, and the tendency of a camp to bring disorderly characters into the neighbourhood, cannot be the subject of compensation. Such injury is too remote; the damage must be the natural and probable consequence of the act: *In re Clarke and Wandsworth Board of Works* (2). It is absurd to say that trespass to adjoining lands can be a use of the lands taken. An injury to be the subject of compensation must be such as would be an actionable wrong but for the statutory powers:

(1) [1897] 2 I. R. 362. (2) 17 L. T. (N. S.) 549.

Ricket v. *Directors, &c., of Metropolitan Railway* (1). The Secretary of State cannot be made liable for the wrongful acts of camp followers. Compensation cannot be awarded for injury to an incorporeal hereditament such as a fishery ; this point was raised, though not decided, in *Bird* v. *Great Eastern Railway Company* (2).

Gordon, K.C., and *Chambers, K.C.*, for Alex. A. Richardson :—

With respect to the compensation for injury to the fishery, it is not necessary to consider whether such compensation can be awarded for injury to an incorporeal hereditament, since the fishery here is annexed to the lands.

Compensation may be allowed for damage likely to be caused to lands not taken, by the proposed use of the lands taken. The arbitrator may take into account anything which would depreciate the market value of the land not taken; one of the elements to be considered is the loss of privacy which must result from the use of the lands taken as a camp. The tendency to cause trespass on the lands not taken is also a matter to be taken into account. The injury need not amount to an actionable wrong : *Reg.* (*Moore*) v. *Abbott* (3) ; *Duke of Buccleugh* v. *Metropolitan Board of Works* (4) ; *Cowper Essex* v. *Local Board for Acton* (5); *In re Stockport, &c., Railway Company* (6) ; Cripps on Compensation, 4th Ed. 136.

Fitzgerald, in reply :—

In *Cowper Essex* v. *Local Board for Acton* (5) the lands were taken for use as a sewage farm which was necessarily a nuisance.

Cur. adv. vult.

The judgment of the Court was delivered by—

GIBSON, J. :— Nov. 25.

Two of the three grounds on which the award is impeached may be disposed of in a few words. The first is that the opinions

(1) L. R. 2 H. L. 175.
(2) 19 C. B. (N. S.) 268.
(3) [1897] 2 I. R. 362.
(4) L. R. 5 H. L. 418.
(5) 14 A. C. 153.
(6) 33 L. J., Q. B. 25.

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of the Judges of this Division in *Moore's Case* (1), that "compensation" under the Defence Code might include compensation for depreciation of other lands of the owner not taken, were erroneous. It does not appear whether the lands in this case were taken under the Defence Acts without reference to the Lands Clauses Acts. Assuming that they were taken exclusively under the former Code, I think that we ought to follow the view of law taken in the Queen's Bench in *Moore's Case* (1), which, though not necessary to the actual decision, was certainly not disapproved of by the Court of Appeal.

The second ground of attack was that compensation for a fishery as an incorporeal hereditament could not be given. This point was given up when it appeared that the fishery was not detached from ownership of the soil. Even if it was an incorporeal hereditament, I do not see why it would not be the subject of compensation if injuriously affected: see the *Cambrian Railway Case* (2), approved of in the *Great Western Railway Case* (3).

The third objection to the award was that which was chiefly argued. It was that the umpire had allowed compensation for depreciation from possible trespass on the part of Mr. Richardson's land not taken, and particularly trespass from the introduction of disorderly and bad characters about his grounds during the daytime and at night.

Whether compensation under the Defence Act is as extensive as under the Land Clauses Code is doubtful. It certainly is not greater. Compensation can only be given under the Lands Clauses Acts for an injuriously affecting occasioned by the execution of the works. The construction and use of a camp may depreciate the value of adjoining parts of the estate; for such depreciation from loss of privacy, loss of amenity, vulgarization of the neighbourhood, and the natural concomitants of a camp, compensation may be assessed. There may be a certain amount of inevitable nuisance from the presence of a camp; such nuisance is legalized: *Truman's Case* (4); and cannot be the subject of legal complaint afterwards; but the injury resulting to the landowner

(1) [1897] 2 I. R. 362.
(2) L. R. 6 Q. B. 422.
(3) 9 A. C. at p. 802.
(4) 11 A. C. 45.

must be made good in compensation. The question here is whether apprehended damage from trespass or illegal conduct, especially of outsiders, can form an item in such compensation.

The only authority cited to support the umpire's view was the *Cowper Essex Case* (1), and a passage in Lord Halsbury's speech at p. 161 was particularly relied on. I have examined that case carefully. At the hearing before the sheriff evidence was given that, even in the absence of any nuisance in fact arising from the sewage farm, there was a depreciation in the marketable value of other parts of the claimant's lands: *Reg.* v. *Cowper Essex* (2). Mathew and Day, JJ., thought that there was substantial injury from the construction of sewage works with their natural incidents, and that the verdict allowing compensation for such injury was right. Their judgment was reversed by the Court of Appeal, but restored by the House of Lords. It was taken as clear that if the jury could legitimately give any compensation, the question of *quantum* could not be considered, the case being one of *certiorari*. Sir H. Davey, for the appellant, argued that even though there would be no nuisance, people would anticipate that there would be, and that the damage though sentimental would be real.

Lord Halsbury doubted if compensation could be given for an imaginary injury, but held that liability of a neighbourhood to even occasional and exceptional annoyances was a real injury to property. "Occasional negligence," he says (p. 161), "is one of the ordinary incidents of human life." Land is certainly more marketable when it is free from works of that character. It was open to the jury to find that the claimant's land not taken would be affected by the construction and use of the sewage works.

Lord Watson thought that the jury were mainly influenced by the consideration that the sewage works, though capable of being conducted, and usually conducted, so as not to create any actionable nuisance, are, nevertheless, even when so conducted, distasteful, and tend to depreciate the market value of building land in the vicinity, and also that negligence in the conduct of the works may occasionally give rise to actionable nuisance. At p. 166 he states the result of the authorities to be that a proprietor

(1) 14 A. C. 153. (2) 14 Q. B. D. at p. 754.

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is entitled to compensation for depreciation of his other lands in so far as such depreciation is due to the anticipated *legal use* of the works to be constructed. The use of sewage works may not be a nuisance, but may alter the character of land in the neighbourhood, and diminution in value from such cause is a substantial and not imaginary injury.

Lord Bramwell considered that if there was any damage which the jury could give their verdict must stand ; and that the sewage works must be a nuisance to the lands not taken. They would cause lessening of health and comfort.

Lord Fitz Gerald held that building land must be affected in value by the vicinity of a sewage farm, with its real or supposed tendency to foster germs injurious to human life and health.

Lord Macnaghten was of opinion that an unfounded apprehension, even from ignorance or fancy, causing loss was a real injury to the owner; apprehension of mischief was damage of itself. His view in this respect seems opposed to Lord Halsbury's. I understand him to mean that the ordinary standard of society—not individual caprice—may be considered in deciding the question. A cemetery might cause no nuisance, yet if owing to the usual feelings of people the presence of a cemetery would lower the value of adjacent land, such land might be deemed to be injuriously affected. The character of a neighbourhood would be altered when one's neighbours were the dead instead of the living. If injury to amenity and privacy can be considered, I do not see why sentimental injury should be excluded where the depreciation from that cause is real.

It will be seen from the above summary that Lord Halsbury's view as to depreciation from apprehended negligence was not adopted by the other learned Lords. I am not sure that his expressions have not been unduly strained in the argument before us. They may mean merely that there is a certain amount of unavoidable risk from the presence of a dangerous work like a powder magazine or sewage farm ; such danger might constitute a nuisance, and would be a legitimate subject of compensation. A momentary relaxation of care, hardly distinguishable from accident, might cause serious mischief. The worry and anxiety from such perilous proximity would naturally affect the value of neighbouring

property. The apprehension would be reasonable. I doubt, however, if the Lord Chancellor intended to lay down that depreciation in respect of speculative injury from future actionable negligence would be a proper item of claim. The landowner can hardly ask to be paid twice over, once for depreciation from apprehended acts of actionable negligence—a matter which baffles money calculation, and a second time in the form of damages when the negligence actually occurs. The distinction, however, between danger from what (having regard to human frailty) may be called unavoidable oversight, and actionable negligence, is very thin, and the point is one of much doubt. Except the one passage in Lord Halsbury's speech, no authority has been cited bearing on the matter.

Assuming, however, in Mr. Richardson's favour that compensation might be allowed in respect of depreciation from apprehended negligence in the ordinary conduct of the camp as a camp, the principle can hardly be extended to apprehension of acts of active misconduct on other parts of the estate outside the land taken. To allow compensation in such case is entirely beyond the range of authority, and the Defence Code certainly does not warrant any such new departure. The matter on which I disagree with the umpire may, with regard to money result, be more a matter of words than of substance. But the assessment, so far as it proceeds on depreciation for possible trespass on lands not taken, is in principle erroneous. The camp cannot be treated as an invitation to, and cause of, external illegality, though full compensation can be given for diminished value resulting from its natural and ordinary operations as a camp with its accustomed incidents.

The matter must accordingly be re-considered by the umpire. The introduction of an inadmissible item of compensation vitiates an award *pro tanto*: *Penny's Case* (1); *Buccleugh's Case* (2); *Rhodes' Case* (3).

Solicitor for the Secretary of State for the War Department: *Sir Patrick Coll.*

Solicitors for A. A. Richardson: *Carson & M'Dowell.*

J. G. T.

(1) 7 E. & B. 660. (2) L. R. 5 Ex. at pp. 229, 230. (3) 1 C. P. D. 402.

Appeal. 1901. June 24.

WHEELER *v.* COMMISSIONERS OF PUBLIC WORKS IN IRELAND (1).

Negligence—Liability—Corporation performing public duties—Servants of the Crown—Commissioners of Public Works—Public park—Maintenance out of funds voted by Parliament—No power to levy tolls or rates—St. Stephen's Green Act, 1877 (40 & 41 *Vict. c.* cxxxiv).

By the St. Stephen's Green Act, 1877, the square, which previously had been vested in Commissioners as a private square, was vested in the Commissioners of Public Works, who were, by the Act, charged with the duty of maintaining the same, to be used as a public park, with power to accept private subscriptions from persons willing to contribute towards carrying into execution the purposes of the Act, but with no power to levy rates or tolls, though authorized to defray such of the expenses incurred in carrying the Act into execution as could not be defrayed out of moneys received by them under the Act out of moneys to be provided by Parliament. The plaintiff in this action sought damages for injuries received by him while lawfully using the square, by coming in contact with an iron railing, which the statement of claim alleged was erected therein by the Commissioners of Public Works in a negligent and dangerous manner:—

Held (Palles, C.B., *dissentiente*), that the Commissioners of Public Works in Ireland were not, by virtue of the Act, constituted servants of the Crown.

Held, also, that it was no defence to an action of negligence that the defendants had received no money under the Act applicable to the purposes of the Act, and that the expenses incurred by them in carrying the Act into execution were solely defrayed out of moneys provided by Parliament for such purpose, and that Parliament had not provided moneys for payment to the plaintiff, or out of which he could be paid any damages in case such should be recovered against the defendants.

Held, also, that it was no defence to an action of negligence that the defendants had no power to levy tolls, nor were any moneys other than moneys voted by Parliament, received by them in respect thereof, and the defendants had no property or moneys for payment to plaintiff, or out of which the plaintiff could be paid any damages.

APPEAL from an order of the King's Bench Division, made the 28th day of February, 1901, allowing certain points of law raised

(1) Before PALLES, C.B., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

by the plaintiff in his reply by way of demurrer to the 6th, 7th, and 9th paragraphs of the defendants' statement of defence, and directing that these paragraphs should be struck out as being bad in substance, and disclosing no answer in law to the plaintiff's action.

The statement of claim was as follows:—

1. Prior to the passing of the St. Stephen's Green (Dublin) Act, 1877 (1), the square and grounds of St. Stephen's Green, Dublin, were vested in certain Commissioners, and the said Act, after reciting among other things that there was within the municipal boundaries of the city of Dublin no public park, and that it would be of great public advantage and conduce to the health and enjoyment of the inhabitants of the said city if the said square were opened for their recreation, and were for that purpose discharged from all estates, claims, rights, and incumbrances affecting it, and were vested in and maintained and managed by the Commissioners of Public Works in Ireland, provided for the discharge of all debts of the said Commissioners of St. Stephen's Green, and the rendering of the said square and grounds suitable for use as a public and ornamental park.

2. Under and by virtue of the said Act and the Order of the Lord Lieutenant of Ireland, dated 22nd July, 1880, and published in the *Dublin Gazette* of 27th July, 1880, said square St. Stephen's Green, and all the grounds enclosed within the posts and chains of St. Stephen's Green (in the said Act referred to as St. Stephen's Green), and all property of whatsoever description belonging to the then existing Commissioners of St. Stephen's Green in their capacity as such Commissioners, were transferred to and vested in the defendants, the Commissioners of Public Works in Ireland, as incorporated by the Act 32 & 33 Vict. c. 74, to be by them held for the purposes in the said Act mentioned.

3. The said Act further provided that the defendants, after the transfer to them of the said premises, should maintain the same as an ornamental park or pleasure-ground for the recreation of the public, and might make from time to time such alterations in the arrangement, laying out, and fencing of the same as they should think fit, and that the defendants should at all times maintain and keep the said St. Stephen's Green and the erections thereon and all other things thereto belonging in good and sufficient repair, and in a proper and ornamental condition, and allow the same to be used and enjoyed as a public park, and that for effecting any of the purposes of the Act it should be lawful for the defendants to accept private subscriptions from persons willing to contribute towards carrying into execution the objects of the Act.

4. The defendants, being possessed of the said St. Stephen's Green under and by virtue of the Act and Order aforesaid, and subject to the provisions of

(1) See pages 206–213, *infra*.

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the said Act, wrongfully erected and maintained certain iron structures of varying heights, and with sharp spikes projecting horizontally from the top of such structures, around the trees on the ground enclosed within the posts and chains aforesaid in such a manner as to be dangerous to persons lawfully using the said ground, whereby the plaintiff lawfully using the said ground came into contact with and was pierced through the right eye by one of the said sharp spikes, and was so severely injured that his eye has had to be removed, and that he has suffered great pain and has been prevented from pursuing his studies as a medical student, and has incurred heavy expenses, and has been permanently injured in his career in life.

5. The defendants being possessed of the said St. Stephen's Green under and by virtue of the Act and Order aforesaid, and subject to the provisions of the said Act, did not maintain and keep the same and the erections thereon in proper condition, but negligently maintained and kept the said iron structures in an improper condition aforesaid so as to be dangerous to persons lawfully using the said ground, whereby the plaintiff lawfully using the said ground was pierced through the right eye by one of the spikes as aforesaid, and was so severely injured that his eye has had to be removed, and that he has been and still is prevented from pursuing his studies as a medical student, and has incurred heavy expenses and has been permanently injured in his career in life.

The plaintiff claims £5000 damages.

The defendants delivered the following defence:—

1. The defendants believe that the facts stated in the first and second paragraphs of the statement of claim are as therein set forth, and that the "St. Stephen's Green (Dublin) Act, 1877," hereinafter called the Stephen's Green Act, and the Order of the Lord Lieutenant of the 22nd July, 1880, are to the purport and effect in the first, second, and third paragraphs of the statement of claim mentioned, so far as the same are respectively set forth in such paragraphs; but, for the sake of certainty, the defendants refer to the said Act and Order.

2. For a defence to the cause of action in the fourth paragraph of the statement of claim mentioned, the defendants deny that they did the acts complained of, or any of them.

3. For a second defence to the said cause of action, the defendants say that the alleged damage was not caused or occasioned by any of the acts complained of. It arose from inevitable accident, owing to the pressure and movements of the crowds assembled to view the illuminations in honour of the visit of Her Majesty the Queen.

4. For a third offence to the said cause of action, the defendants say that the alleged damage was not caused or occasioned by any of the acts complained of. It arose from the negligence and improper conduct of the plaintiff, who, by the exercise of reasonable care, could have seen the tree guard in the said fourth paragraph mentioned and avoided coming in contact with it.

5. For a fourth defence to the said cause of action, the defendants say that there was contributory negligence on the part of the plaintiff.

6. For a fifth defence to the said cause of action, the defendants say that St. Stephen's Green is vested in them as trustees for or as officers or servants of the Crown, and that they did the said acts as such trustees, servants, or officers, and not otherwise.

7. For a sixth defence to the said cause of action, the defendants say that they have received no money under the Stephen's Green Act applicable to the purposes of that Act, and that the expenses incurred by them in carrying that Act into execution are solely defrayed out of moneys provided by Parliament for such purposes, and Parliament has not provided moneys for payment to the plaintiff, or out of which the plaintiff could be paid any damages in case such should be recovered against the defendants.

8. For a seventh defence to the said cause of action, the defendants say that the acts complained of were acts done by the defendants under and by virtue of the Stephen's Green Act without negligence and with a due regard to the public safety.

9. For an eighth defence to the said cause of action, the defendants say they have no power to levy tolls or charges in respect of St. Stephen's Green, nor are any moneys or revenues of any sort (other than moneys voted by Parliament) received by them in respect thereof, and the defendants have no property or moneys for payment to the plaintiff or out of which the plaintiff could be paid any damages in case such should be recovered by him against the defendants.

10. For a defence to the cause of action in the fifth paragraph of the statement of claim mentioned, the defendants deny that the iron structures therein mentioned were kept in an improper condition, or so as to be dangerous to the persons using the said ground, or that the defendants were guilty of the alleged or any negligence in respect of same.

11. To avoid prolixity the defendants repeat the fourth, fifth, sixth, seventh, eighth, and ninth paragraphs of this their statement of defence, and pray that the same respectively may be taken as several and distinct defences to the cause of action in the fifth paragraph of the statement of claim mentioned.

The plaintiff delivered the following reply :—

1. The plaintiff joins issue on the defence save as to admissions therein of facts alleged in the statement of claim.

2. The plaintiff will object that the defence in the sixth paragraph of the statement of defence contained is bad in substance, on the grounds that on the true construction of the St. Stephen's Green (Dublin) Act, 1877, St. Stephen's Green is not vested in the defendants as trustees for or as officers or servants of the Crown, as in the said paragraph alleged, but as trustees for the purposes of the said Act; and the defendants are, in any event, liable for the breach of duty and negligence in the statement of claim

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complained of; and that the said paragraph does not set forth sufficient ground of defence.

3. The plaintiff will object that the defence in the seventh paragraph of the statement of defence contained is bad in substance, on the grounds that it is not alleged therein that the breach of duty in the statement of claim complained of arose from the fact that it was impossible for the defendants to perform the said duty through want of funds available for the purpose; and that the plaintiff is entitled to judgment against the defendants whether Parliament has or has not provided moneys for the satisfaction of such judgment; and that the expenses incurred by the defendants in carrying the Act into execution include any liability they may incur by reason of any breach of duty or negligence on their part therein; and that such of the said expenses, including such liability as aforesaid, as cannot be defrayed out of moneys received by the defendants under the said Act as aforesaid, are, under the provisions of the said Act, to be defrayed by the defendants out of such moneys as may be provided by Parliament; and that the trust property vested in the defendants as trustees by the said Act is subject to and liable to make good all such expenses, including such liability; and that the said paragraph does not set forth sufficient ground of defence.

4. The plaintiff will object that the defence in the ninth paragraph of the statement of defence contained is bad in substance, on the grounds that it is not alleged therein that the breach of duty and negligence in the statement of claim complained of arose from the fact that it was impossible for the defendants to perform the said duty through want of funds available for the purpose; and that the plaintiff is entitled to judgment against the defendants whether the defendants have or have not property or moneys for the satisfaction of such judgment, or whether the defendants have or have not power to levy tolls or charges, or whether any moneys or revenue of any sort (other than moneys voted by Parliament) are or are not received by the defendants; and that the trust premises vested in the defendants by the said Act are subject to and liable to make good any judgment that the plaintiff may recover against them in respect of the causes of action in the statement of claim complained of; and that the expenses of the defendants in carrying the Act into execution include any liability the defendants may incur by reason of any breach of duty or negligence on their part therein; and that, by the provisions of the said statute, such expenses, including such liability, are to be defrayed by the defendants as thereinafter mentioned; and that the said paragraph does not set forth sufficient ground of defence.

The material portions of the St. Stephen's Green, Dublin, Act, 1877 (40 & 41 Vict. c. cxxxiv), are the following:—

Whereas by an Act passed in the session of Parliament held in the fifty-fourth year of the reign of King George the Third, chapter two hundred and eight, intituled "An Act for the Improvement of the square called Saint

Stephen's Green in the city of Dublin," (in this Act referred to as "the Act of 1814,") the Lord Mayor, Recorder, Treasurer, and High Sheriff of the said city, and the representatives in Parliament for the said city, all for the time being, together with certain then inhabitants of the said square, and their successors to be elected in manner therein-after mentioned, were constituted and appointed Commissioners for carrying that Act into execution; and such Commissioners were empowered to contract for the absolute purchase of all or such part of the ground in the interior of the square called Saint Stephen's Green as they should judge necessary for the purposes of that Act, or for a grant thereof in fee-farm, subject to such annual rent as might be agreed upon, and the moneys to be paid either for the absolute purchase thereof or for the annual rent to be received under such grant were to be paid out of the moneys to be raised by virtue of that Act, and the said Commissioners were empowered to contract for the making, finishing, and completing, improving, ornamenting, and inclosing of the said square; and towards making, completing, and finishing the said inclosure and improvements, and in order to create a permanent fund for that purpose, and for the payment of the purchase-money of the ground of the interior of the said square, or for the annual rent thereof, all the houses, grounds, lots, and tenements surrounding the said square were made liable to the annual payment of such sum as the said Commissioners should from time to time in manner therein mentioned direct, not exceeding the rate of five shillings for each foot of frontage; and in order to raise a sufficient sum of money for the purposes of the said Act, the said Commissioners were empowered to raise by sale or mortgage of all or any part of the said fund, or by issuing debentures thereon, bearing interest at a rate not exceeding six pounds per centum per annum, or by the yearly appropriation of any part thereof, such sum or sums of money as should or might be sufficient for the purpose of paying the purchase-money or rent of the ground of the interior of the said square (as the case might be) as aforesaid, and for all other the purposes therein mentioned:

And whereas in pursuance of the provisions of the Act of 1814 the Commissioners constituted by the said Act agreed with the Right Honourable the Lord Mayor, Aldermen, and Burgesses of the said city of Dublin (in this Act referred to as "the Corporation") for a grant in fee-farm of the said square at a yearly rent, and in pursuance of such agreement a conveyance by way of lease and release bearing date the nineteenth day of November one thousand eight hundred and fourteen was made to the said Commissioners by the Corporation of the land or ground in the interior of the said square, and which are the premises herein-after more particularly described, at the yearly rent of three hundred pounds late Irish currency, equal to two hundred and seventy-six pounds eighteen shillings and sixpence present currency of the United Kingdom:

And whereas since the passing of the Act of 1814, the Commissioners thereby constituted and their successors have continued to act in execution of the said Act:

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And whereas the residue now remaining unpaid of the debt created under the Act of 1814 by the issue of debentures amounts to two thousand pounds or thereabouts, together with the interest thereon now due at the rate of four pounds per centum per annum:

And whereas there is within the municipal boundaries of the city of Dublin no public park, and it would be of great public advantage, and conduce to the health and enjoyment of the inhabitants of the said city, if the said square were opened for their recreation and enjoyment, and were for that purpose discharged from all estates, claims, rights, and incumbrances affecting it, and were vested in and maintained and managed by the Commissioners of Public Works in Ireland:

And whereas in furtherance of the object aforesaid it has been agreed between the Corporation and the Commissioners of Saint Stephen's Green (in this Act referred to as the "existing Commissioners"), and Sir Arthur Guinness, Baronet, one of the members elected to serve in the present Parliament for the said city of Dublin, that the said Sir Arthur Guinness should provide such funds as may be necessary for paying the residue now remaining unpaid of the said debenture debt, and all interest which shall accrue due thereon after the passing of this Act and until the discharge of the said debt, and should effect such improvements in the said square as shall, in the opinion of the Commissioners of Public Works in Ireland, render it suitable for a public park; and that the Corporation should immediately after the gale day next ensuing after the passing of this Act relinquish the aforesaid yearly rent, and release the said existing Commissioners and the said square from all claims on foot thereof, and, so soon as the said square shall be opened for the purposes aforesaid, should thenceforth gratuitously supply water and gas at such time and in such quantities as may in the opinion of the said Commissioners of Public Works be required for the use of the said square as a public park; and that all the estate and interest of the existing Commissioners under the said conveyance of the nineteenth day of November one thousand eight hundred and fourteen, and all their liabilities thereunder, should, so soon as the said square shall be opened for the purposes aforesaid, immediately be determined in the manner herein-after provided; and that the said square should be vested in the Commissioners of Public Works in Ireland, (herein-after called "the Commissioners of Public Works,") discharged from all claims of the said existing Commissioners, and of the Corporation, and from all other estates, rights, and incumbrances affecting the same:

And whereas the Lords Commissioners of Her Majesty's Treasury have sanctioned the said arrangement:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. This Act may be cited for all purposes as "The Saint Stephen's Green (Dublin) Act, 1877."

2. Immediately after the passing of this Act an account shall be taken by the existing Commissioners of the sum which shall be then due for principal and interest on foot of debentures issued for moneys borrowed in pursuance of the provisions of the Act of 1814. Upon the taking of such account the said Sir Arthur Guinness shall pay to the existing Commissioners the sum which shall be ascertained to be due for principal, and for such interest as shall accrue due after the passing of this Act and up to the date of such payment of the principal, and the existing Commissioners shall thereupon, as soon as may be possible, apply the same in payment of the said debenture debt, and the interest thereof.

. . . . . .

4. At any time after the passing of this Act, and before the first day of July one thousand eight hundred and seventy-nine, it shall be lawful for the said Sir Arthur Guinness to enter upon the said square, as the same is in the sixth section of this Act more particularly described, and if necessary, to alter the present inclosure of the same, and to lay out the same as public and ornamental pleasure grounds and to make roads, paths, and fences therein, and to erect lamps and fountains, and to lay down gas pipes and water pipes therein, and to do all such acts, matters, and things, whether of the same kind as those above mentioned or different, as may be proper for rendering the said square suitable for use as a public and ornamental park. The works which the said Sir Arthur Guinness is by this section empowered to effect shall be according to the plans and specifications to be prepared by the said Sir Arthur Guinness, and to be agreed on before the commencement of the works between him and the said Commissioners of Public Works, subject to the approval of the Lord Lieutenant.

5. On or before the first day of July one thousand eight hundred and seventy-nine, upon proof to the satisfaction of the Accountant General of the Court of Chancery in Ireland of the payment by the said Sir Arthur Guinness to the existing Commissioners of the sum herein-before mentioned in that behalf, and of the application or lodgment of the same by the existing Commissioners for the purpose of discharging the said debenture debt in the manner herein-before prescribed, the said Accountant General shall give notice of such payment and application or lodgment to the Lord Lieutenant. On or before the same first day of July, the Commissioners of Public Works, if they shall be satisfied that the said square has been rendered suitable for a public and ornamental park according to the plans before mentioned, shall give notice that they are so satisfied to the Lord Lieutenant. Upon the receipt of both the notices herein-before mentioned, the Lord Lieutenant shall, by order to be published in the *Dublin Gazette*, declare that the said square is open for a public park, to be called and known by the name of "Saint Stephen's Green."

6. Upon the making of the said order the said square in Dublin called Saint Stephen's Green, and all other property (if any) (in this Act referred to

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as "Saint Stephen's Green") comprised in the said conveyance, bearing date the nineteenth day of November one thousand eight hundred and fourteen, made by the Corporation to the then Commissioners for the improvement of Saint Stephen's Green, and all the estate and interest therein of the Corporation and of the existing Commissioners, and all the ground which has been for some time before the passing of this Act inclosed within the posts and chains of Saint Stephen's Green, shall be and the same are hereby transferred to and vested for the purposes of this Act in the Commissioners of Public Works, as incorporated by the Act of the session of Parliament held in the thirty-second and thirty-third years of the reign of Her present Majesty, chapter seventy-four; and the Commissioners of Public Works shall thenceforth hold the same absolutely freed and discharged from the said conveyance, and from the rent reserved by the same, and, save as in this Act expressly provided from all obligations, debts, and liabilities whatsoever affecting the same, and discharged from all former and other estates, rights, titles, charges, and incumbrances whatsoever.

7. When and so soon as Saint Stephen's Green shall have been transferred to and vested in the Commissioners of Public Works as aforesaid (which transfer and vesting is herein-after referred to as "the transfer"), all property of whatsoever description belonging to the existing Commissioners under the Act of 1814, in their capacity as such Commissioners shall vest absolutely in the Commissioners of Public Works.

8. From and after the transfer the existing Commissioners shall cease to act as such, and all the houses grounds lots and tenements surrounding Saint Stephen's Green shall be absolutely freed and discharged from the payment of any annual or other sums by direction of the Commissioners under the Act of 1814, except for the payment of any debt or the discharge of any obligation or liability incurred before the transfer, and not otherwise satisfied or discharged by the operation of this Act, and from all liability in respect of any debentures issued under the authority of the Act of 1814, or of any moneys secured by any such debentures as aforesaid, and the Act of 1814 shall thereupon be repealed: Provided always, that, except as by this Act otherwise specially provided, such repeal shall not affect anything duly done or suffered under the Act of 1814 before the transfer.

. . . . . .

10. Except as is by this Act otherwise specially provided, all contracts and agreements entered into or made before the transfer by, to, or with the existing Commissioners, or any trustees or persons acting on their behalf, or by, to, or with any other person to whose rights and liabilities they have or shall have succeeded, shall be determined upon the transfer, but without prejudice to any right of action for any breach of any of such contracts which shall have theretofore occurred.

. . . . . .

12. Nothing in this Act contained shall release, discharge, or suspend any

action, suit, or other proceeding at law or in equity which was pending by or against the existing Commissioners, or any of them, in relation to the affairs of the existing Commissioners, or to which they or any of them, in relation to such affairs, shall be parties immediately before the transfer, but every such action, suit, or other proceeding may be maintained, prosecuted, or continued by or in favour of or against the Commissioners of Public Works (as the case may be) in the same manner and as effectually and advantageously as the same might have been maintained, prosecuted, or continued by or in favour of or against the existing Commissioners, or any of them, if this Act had not been passed, the Commissioners of Public Works being in reference to the matters aforesaid in all respects substituted for the existing Commissioners.

13. From and after the twenty-ninth day of September one thousand eight hundred and seventy-seven, all liability to pay any rent which but for the passing of this Act would have accrued due after such day, under the above-recited deed of the nineteenth day of November one thousand eight hundred and fourteen, in respect of Saint Stephen's Green shall absolutely cease and determine; and all rights of the Corporation in respect of any such rent shall be deemed to be and the same are hereby released.

14. From and after the transfer the Corporation shall furnish, free of cost, such supplies of water and gas as the Commissioners of Public Works shall from time to time determine to be suitable for the use of Saint Stephen's Green as a public and ornamental park: Provided that the Commissioners of Public Works shall not at any time require such a supply of water as would necessarily impair the sufficiency of the supply of water by the Corporation for domestic use or manufacturing purposes.

Management of St. Stephen's Green.

15. The Commissioners of Public Works shall after the transfer maintain Saint Stephen's Green as an ornamental park or pleasure ground for the recreation or enjoyment of the public, and may, with the consent of the Commissioners of Her Majesty's Treasury, erect any lodges, ornamental buildings, or other erections thereon, and may, with the like consent, if they think fit, provide any ornamental fountains or other ornamental waterworks therein, and employ such gate or lodge keepers and other necessary officers and servants, for the order and management thereof, in all respects as they may deem suitable and proper, and may from time to time make such alterations and improvements in the arrangement, laying out, planting, draining, and fencing of the same, for the purposes of such park or pleasure ground, and alter or pull down any building, erection, or other work therein, as they may think fit; and, subject to the powers aforesaid, the Commissioners of Public Works shall at all times maintain and keep Saint Stephen's Green, and the buildings and erections thereon, and all other things thereto belonging, in good and sufficient repair and in a proper and ornamental condition, and shall allow the same to be used and enjoyed as a public park for the recreation and enjoyment of the public, and not for any other purpose; and for effecting any of the

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objects of this Act it shall be lawful for the Commissioners of Public Works to accept private subscriptions from persons willing to contribute towards carrying into execution the powers of this Act, or to permit such persons from time to time to contribute to the objects of this Act, by the erection of such statues or other suitable works in the said park as the said Commissioners of Public Works may approve.

Byelaws.

16. At any time after the transfer, the Commissioners of Public Works may from time to time make such byelaws as they think fit for all or any of the purposes following; that is to say, [Here follow the various purposes including amongst others]:—

For preserving order and good conduct amongst persons frequenting Saint Stephen's Green, and for preventing nuisances and obstructions in or on the pathways or roads surrounding or adjoining the same, and for preventing any annoyance to the inhabitants of the neighbouring houses by the persons using the said park:

. . . . . .

No byelaw made by the Commissioners of Public Works under this Act shall be of any force or effect until the same has been publicly exhibited in Saint Stephen's Green for fourteen days, and a copy thereof delivered to the town clerk of the City of Dublin, and has been afterwards approved under the hand of the Chief or Under Secretary to the Lord Lieutenant, and shall have affixed thereto the seal of the Commissioners of Public Works, and shall be published as herein-after mentioned.

. . . . . .

21. The Commissioners of Public Works shall defray such of the expenses incurred in carrying this Act into execution as cannot be defrayed out of moneys received by them under this Act or applicable to the purposes of this Act, out of such moneys as may be provided by Parliament for such purpose; and the accounts of all moneys expended by the Commissioners of Public Works under this Act shall be subject to the provisions of the Exchequer and Audit Departments Act, 1866.

22. The Commissioners of Public Works shall not be assessed or rated to any county, borough, or other local rate or cess in respect of Saint Stephen's Green or any erection thereon, or any part thereof respectively.

By consent the points of law raised by the 2nd, 3rd, and 4th paragraphs of the plaintiff's reply were set down for hearing before the King's Bench Division before trial of the action under Ord. XXV., Rule 2. After argument, the Court (Madden and Boyd, JJ., *dis.* Barton, J.), ordered that the points of law raised by the said 2nd, 3rd, and 4th paragraphs of the plaintiff's reply to the 6th, 7th, and 9th paragraphs of the defendants' statement of defence should be allowed, and ruled in favour of the plaintiff, and accordingly that

the said 6th, 7th, and 9th paragraphs should be struck out, inasmuch as the same were bad in substance, and disclosed no answer to the plaintiff's cause of action.

From this order the defendants appealed to the Court of Appeal.

The Solicitor-General (*G. Wright, Q.C.*), and *J. V. Fitz Gerald*, for the appellants:—

The St. Stephen's Green Act, 1877, shows that the park is vested in the defendants as servants of the Crown, and that the regal hand controls the entire management. It provides (section 4) that the plans were to be subject to the approval of the Lord Lieutenant; that the Lord Lieutenant was to declare the park open by an order to be published in the *Dublin Gazette* (section 5); that the park is to be vested in the defendants freed from all liabilities and obligations whatsoever (sections 6, 7, 8), thus making a *tabula rasa* and instituting a new order of things; that they are to maintain the park for the recreation and enjoyment of the public, with power to make improvements, subject to a Treasury veto (section 15); while for the expenses of the park they have to depend entirely on moneys voted by Parliament, having no powers of local taxation (section 21), and being subject to the provisions of the Exchequer and Audit Departments Act, 1866.

Section 25 of 14 & 15 Vict. c. 42 is almost identical with section 21 of the St. Stephen's Green Act, and in *Murphy* v. *Soady* (1) Palles, C.B., held that its terms conclusively showed

(1) MURPHY *v.* SOADY (1886—J. No. 165. Exchequer Division) was an action brought against the Commissioners of Public Works in Ireland claiming £500 damages for injuries received by the plaintiff who was thrown from his horse while riding in the Phœnix Park, the accident being alleged to have been caused by an iron railing erected in the Park. The reporter is indebted to the kindness of Mr. J. V. FitzGerald for the following note of the case:—

The following pleadings were delivered:—

STATEMENT OF CLAIM.

1. The defendant is sued as the Secretary of the Commissioners of Public Works in Ireland.

2. The Commissioners of Public Works in Ireland so negligently constructed and kept constructed a railing in the Phœnix Park, being a place

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that the Phœnix Park was held by the present defendants as servants of the Crown.

The duties imposed by the statute on the defendants are imposed on them in their corporate capacity as servants of the Crown; they have no duties under the Act except as a corporation, and as servants of the Crown; an action of tort does not lie against them as servants of the Crown, therefore this action does not lie against them in their corporate capacity; if the action lies at all it lies only against the individuals who committed the tort. *Raleigh* v. *Goschen* (1) expressly decides that though a person aggrieved could

under their control and management, that the plaintiff whilst lawfully riding a horse in the said Park was by reason of the premises thrown violently from his said horse and was much injured, and was confined to bed for a considerable length of time, and was put to great expense for medical and surgical services, and the said horse was also greatly damaged and depreciated in value.

3. The Commissioners of Public Works in Ireland negligently erected in the Phœnix Park, Dublin, then being a place under their control and management, a low iron railing in a part of the said Park where the public were authorized and accustomed to ride, in such a position that the same was not visible to a rider using reasonable care and caution while passing along said part of the said Park, and negligently omitted to take any reasonable care or precaution to guard against damage or danger from the said railing to horses or persons lawfully passing along and over the said part of the said Park, by reason whereof the plaintiff whilst lawfully riding a horse in the said part of the said Park, and while using reasonable care and caution, came violently and unexpectedly into collision with the said railing, and was flung violently to the ground, and was much injured and put to great expense for medical and surgical services, and the said horse was much injured and greatly depreciated in value.

Plaintiff claims—1. £500 damages for the cause of action mentioned in the second paragraph of this statement of claim: in the alternative, 2. £500 for that mentioned in the third paragraph of this statement of claim.

DEFENCE.

The defendant, as to the second and third paragraphs of the statement of claim, says:—

1. The defendant denies that the Commissioners of Public Works in Ireland were guilty of any negligence as in said paragraphs alleged.

2. And as a further defence defendant says that the alleged injuries were caused by the negligence of the plaintiff and not otherwise.

(1) [1898] 1 Ch. 73.

sue any one of the Lords of the Admiralty for trespass, committed by him, yet he could not sue the Lords of the Admiralty, being servants of the Crown, as an official body, and that as the action in that case was a claim against them in their official capacity it would not lie: *cf. Hawley* v. *Steele* (1).

The fact that the defendants have been constituted by statute a corporation for the sole purpose of performing certain acts as servants of the Crown shows, within the meaning of the rule laid down by Lord Blackburn in *The Mersey Docks* v. *Gibbs* (2), that contrary intention on the part of the Legislature, in the absence of

3. And the defendant further says that the horse in the said paragraphs mentioned was not the horse of the plaintiff.

4. And for a further defence defendant says that the plaintiff himself so far directly contributed to the misfortune complained of by his own negligence and want of ordinary and common care and caution, that but for such negligence and want of ordinary and common care and caution on his part the said misfortune complained of would not have happened.

5. And defendant further says that the public are not authorized or accustomed to ride in that part of the Phœnix Park in the third paragraph mentioned.

6. The defendant as to the entire of the statement of claim further says:—The Phœnix Park in the statement of claim mentioned is a Royal Park, and the management thereof is vested in the Commissioners of Public Works in Ireland as trustees for Her Majesty the Queen, her heirs and successors, under and by virtue of the 14 & 15 Vict. c. 42, and the 23 & 24 Vict. c. 42, and the other Acts therein referred to, and save as aforesaid they have no control or management of the said Park. The public are permitted by the said Commissioners in exercise of such management of the said Park to ride in portions thereof, including, as the defendant admits, for the purposes of this defence but not otherwise, that portion of said Park in the statement of claim mentioned; but the said Commissioners receive no tolls, fees, or rewards from the public for such user of said Park by them, nor did they receive any toll, fee, or reward from the plaintiff in respect of the user by him of said Park in the statement of claim mentioned; and the acts in the statement of claim complained of were done and committed by certain servants in the employment of the said Commissioners of Public Works, but the acts were done and committed without the knowledge or sanction of the said Commissioners, and they had not at the time of the grievance complained of any notice or knowledge of said acts having been done and committed.

(1) 6 Ch. D. 521. (2) L. R. 1 H. L. 93, at p. 110.

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which the Legislature would be construed to have intended to leave the corporation subject to the same liabilities as private individuals performing the same acts: *Campbell* v. *Hornsby* (1).

There is no case in which it has been held that an action of tort lies against servants of the Crown as such. *Sharpley* v. *Hornsby* (2) was an action brought against the present defendants for acts done by them, not as servants of the Crown, but as "Drainage Commissioners of Ireland," in which capacity they were separately incorporated and vested with legal powers of taxation, and liable to actions like other drainage boards.

7. The defendant as to the entire of the statement of claim further says:—The Phœnix Park in the statement of claim mentioned is a Royal Park, and the management thereof is vested in the Commissioners of Public Works in Ireland as trustees for Her Majesty the Queen, her heirs and successors, under and by virtue of the 14 & 15 Vict. c. 42, and the 23 & 24 Vict. c. 42, and the other Acts therein referred to, and save as aforesaid they have no control or management of the said Park. The public are permitted by the said Commissioners in exercise of such management of the said Park to ride in portions thereof, including, as the defendant admits, for the purpose of this defence but not otherwise, that portion of said Park in the statement of claim mentioned; but the said Commissioners receive no tolls, fees, or rewards from the public for such user of said Park by them, nor did they receive any toll, fee, or reward from the plaintiff in respect of the user by him of said Park in the statement of claim mentioned. And the defendant further avers that the said Commissioners of Public Works are appointed by Her Majesty the Queen, and the acts in the statement of claim complained of were done and committed by a certain Park bailiff not being in the employment of or appointed by or the servant of the said Commissioners, and the said Commissioners had not at the time of the grievances complained of any notice or knowledge of said acts having been done and committed.

REPLY.

1. The plaintiff joins issue upon the first, second, third, fourth, fifth, sixth and seventh paragraphs of the defendant's defence.

2. And for a second replication to the sixth paragraph of the statement of defence the plaintiff says that the acts complained of were done by the said servants of the said Commissioners within the scope of their employment as servants of the said Commissioners.

3. And for a third replication to the said sixth paragraph the plaintiff says that the acts complained of were done by the said servants of the said Com-

(1) I. R. 6 C. L. 37; *per* Fitzgerald, B., at p. 51. (2) 2 I. C. L. R. 590.

[Walker, L.J., referred to *Parker* v. *Carrigrohane Drainage Board* (1).] *Campbell* v. *Hornsby* (2), *Westropp* v. *Commissioners of Public Works* (3), *Burrell* v. *Tuohy* (4), were all actions brought against the defendants where they were acting, not as Crown servants, but as statutory transferees of the liabilities and powers of local taxation possessed by previously existing bodies. The St. Stephen's Green Act, however, does not transfer to the defendants the old liabilities nor the old powers of local taxation possessed by the old Commissioners of Stephen's Green. *Gilbert* v. *The Corporation of Trinity House* (5), which decides that the Corporation

missioners in said paragraph mentioned as and being such servants. And the said Commissioners before action brought ratified and adopted the acts in the said paragraph of the statement of claim complained of.

4. And for a second replication to the defendant's seventh plea the plaintiff says that the acts complained of were done by the said Park bailiff by and under the authority of the said Commissioners and with their sanction.

5. And for a third replication the defendant's seventh plea the plaintiff says that the acts complained of were done by the said Park bailiff acting under the authority of the said Commissioners, and the said Commissioners before action brought ratified and adopted the acts in said paragraph of the statement of claim complained of.

DEMURRER.

1. The defendant joins issue on the plaintiff's replication.

2. The defendant demurs to paragraphs two, three, four, and five of the plaintiff's replication, and says that the same are respectively bad in law on the ground that they do not show any liability on the part of the Commissioners in respect of the matters complained of in this action by reason of the acts of the servants of said Commissioners alleged, and on other grounds sufficient in law to sustain this demurrer

The defendant will rely on the following among other points:—

1. The servants of the said Commissioners in the statement of claim mentioned are not appointed to and cannot be removed from their offices by the said Commissioners.

2. The said Commissioners are officers of the Crown, and not liable to an action for negligence in the performance of acts done in exercise of their official duties.

(1) Since reported—[1902] 2 I. R. 138. [540.

(2) I. R. 6 C. L. 37; 7 C. L. 82,

(3) [1896] 2 I. R. 93.

(4) [1898] 2 I. R. 271.

(5) 17 Q. B. D. 795.

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of Trinity House were not servants of the Crown, shows the importance in questions of this kind to be attached to the power of levying tolls: *Reg.* v. *Williams* (1).

In *Murphy* v. *Soady* (2) the cause of action was similar to that here. The same defendants were charged with negligence, which consisted in the erection of an iron railing in such a position as to be invisible to persons using the Park and thus a source of danger. The Exchequer Division held that the Phœnix Park was vested in the defendants as servants of the Crown, and that an action of tort would not lie against them for acts done by them as such

The demurrer was argued on May 4, 5, and 6, 1887, before PALLES, C.B., DOWSE, B., and ANDREWS, J.

J. V. Fitz Gerald and *F. N. Le Poer Trench, Q.C.* (with them *J. N. Gerrard, Q.C.*), for the defendants.

P. A. O'C. White and *Dodd, Q.C.*, for the plaintiff.

On May 7, 1887, the Lord Chief Baron delivered the following judgment:—

PALLES, C. B.:—

This is an action for negligence against the Commissioners of Public Works, and they are sued by their secretary under the 1 & 2 Wm. 4 c. 33, s. 91. We are of opinion that no cause of action is shown by the 2nd paragraph of the plaintiff's statement of claim, nor is the frame of the 3rd paragraph good. It can, however, be made good by an amendment (which is not objected to) stating that the fence complained of was erected after license to use the Park had been given to the plaintiff. The defence here is in substance that the negligence complained of was not the negligence of the Commissioners but of the Park bailiff. To that defence the plaintiff replied. [His Lordship read the replication.] The defendant contends that the Commissioners are servants of the Crown and nothing more, and if that be so they are not liable for the negligent acts of their subordinate officers, and no amount of ratification would make the negligence the negligence of the Commissioners, but if they were personally negligent an action would lie against them personally and not in their official capacity. The main question therefore is, are they mere servants of the Crown, or are they statutable trustees with duties to the public.

The Crown can do no wrong, nor can it in general be sued. In case of breach of contract there is an established form of action against the Crown, called a Petition of Right, but a wrong done by the Crown must be a wrong

(1) 9 A. C. 418. (2) *Ante*, p. 213 *n*.

servants: Howard's Exchequer, vol. ii., p. 259. Public trustees who levy no rates or tolls cannot be made liable in tort: *Reg.* v. *Williams* (1). The defendants have no funds except those obtained from Parliament. Government revenue cannot be reached by a suit against public officers in their official capacity: *Churchward* v. *The Queen* (2); *Palmer* v. *Hutchinson* (3); *Wood's Estate* (4). *R.* (*Galsworthy*) v. *Selby Dam Drainage Commissioners* (5) is distinguishable, because the defendants there had power to levy rates. No mandamus lies against the Treasury: *Re Nathan* (6).

The fact that St. Stephen's Green is bound by a trust in favour

done by a servant of the Crown, and it has been held in *Tobin* v. *The Queen* (10 L. T. 762) that no Petition of Right will lie in such a case; but if there is a right of action it is a personal action against the servant of the Crown for negligence. The 1 & 2 Wm. 4 c. 33, s. 91, providing that the Commissioners may be sued in the name of their secretary, applies only to actions brought on account of that Act or Acts incorporating it or containing the same provisions. For example, an action would lie against the Commissioners, as Commissioners of Drainage, for injuries inflicted by them acting in execution of the Drainage Acts. *Sharpley* v. *Hornsby* (2 Ir. C. L. R. 590) was such a case. The question here is whether under the particular circumstances of this case the Commissioners can be made liable for an act of wrong done by their servant. If they are servants of the Crown such an action would not lie, for if it did it would extend the liability of the Crown, which can only be done by statute. The case of *The Mersey Dock Trustees* v. *Gibbs* (L. R. 1 H. L. 93) shows that there are two distinct classes of cases: 1st, where the defendant is a public officer in the sense that he is a servant of the Government; and 2nd, where the defendants are trustees of an undertaking with duties to the public; and the question here is within which of these classes do the Commissioners come. The answer to this question, as Mr. FitzGerald remarked in the beginning of his argument, must depend upon the construction of the Acts of Parliament relating to the Phœnix Park; it is not necessary to travel out of those Acts. The management of the Park is now vested in the Board of Works by 23 & 24 Vict. c. 42, and they have the same powers as the First Commissioner of Works formerly had under the 14 & 15 Vict. c. 42, s. 2. The 10 Geo. 4 c. 50, s. 7, gave power to borrow money upon the credit of the Land Revenues of the Crown, and the 9th section of that Act gave the Treasury power to appoint and remove officers. The 17th section of this Act is as follows—[His Lordship read the section]. The intention of this section is, as

(1) 9 A. C. 418.
(2) L. R. 1 Q. B. 173.
(3) 6 A. C. 619.
(4) 31 Ch. D. 607.
(5) [1892] 1 Q. B. 348.
(6) 12 Q. B. D. 461, 476, 480.

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of the public does not prevent its being Crown property: *Harte* v. *Holmes* (1); *Reg.* v. *M'Cann* (2). The fact that the Commissioners are authorized by section 15 of the Act to accept gifts does not prevent the property being Crown property: *Colchester* v. *Kewney* (3).

Ronan, K.C., and *Samuels, K.C.* (with them *A. C. Meredith*), for the respondent:—

The Commissioners of Public Works were incorporated by 32 & 33 Vict. c. 74, for the purpose "of taking, acquiring, and holding any lands in Ireland required (*a*) for any department of the public service; or (*b*) for any public purpose." Their official position is therefore consistent with their being either trustees for the Crown, or with their being trustees for public purposes. Under various Acts of Parliament the defendants hold property of the

contracts must be entered into under the provisions of the Act, to provide a remedy, not by a cumbrous Petition of Right, but a remedy by an action against these Commissioners by their own name. No other action could lie against them in their capacity as Commissioners except that provided by statute; there is no provision made for a remedy for their unlawful acts, because the Crown can do no wrong; and there is no provision made for the payment of damages out of the profits of the Park, because under ordinary circumstances Crown property could not be charged by the act of a servant of the Crown.

The 25th section of the 14 & 15 Vict. is conclusive of the question here, and I thought so from the time I first heard it read, unless it could be shown that its effect was taken away by a more recent statute. We know that at the beginning of the present reign that, in consideration of an allowance for the support of the Crown, it was agreed that the revenue derived from the Crown lands should be carried to the credit of the nation, accordingly the section proceeds. [His Lordship read the section.] Nothing whatever can be deducted from the profits of the herbage, tithe rentcharges, and other like charges; the rest must be paid to the Consolidated Fund. Where is there any duty cast on the Commissioners with reference to individual members of the public? The section negatives that there is any property vested in them which can be liable to this action, and is, of itself, enough to show they are servants of the Crown.

(1) [1898] 2 I. R. 656. (2) L. R. 3 Q. B. 141, 677.
(3) L. R. 1 Ex. 368, at p. 380; affirmed—2 Ex. 253.

most varied character, and the capacity in which they hold any particular property and the obligations to the public imposed on them in respect thereof depend not on any general consideration, but on the special legislation applicable to the case, which in the present instance is the St. Stephen's Green Act, 1877. Before this Act St. Stephen's Green was vested in Commissioners under a local Act (54 Geo. 3 c. 208). It was held by them under a fee-farm grant made by the Corporation of Dublin at the yearly rent of £300 (Ir.). The Commissioners had certain borrowing and taxing powers, and had incurred a debt of £2000, secured by debentures. The square had never belonged to the Crown. It was not public property, but was maintained by the Commissioners for the use of the inhabitants of the houses round the square. Through the munificence of Sir Arthur Guinness, with liberal aid from the Corporation and the Treasury, this private square was converted

I understood Mr. Dodd to argue that as the Court of Exchequer Chamber held these same Commissioners liable to an action for negligence in *Campbell* v. *Hornsby* that they must be liable here; for no distinction could be drawn from the fact that the question there involved rights over water and here over land. The fact of no tolls being taken could make no difference, because the surplus is to be paid into the Exchequer, and the fact that the plaintiff here was using real property by license does not constitute a difference, as an action for negligence may be sustained notwithstanding, but the answer is that the true distinction is that there was not merely no toll here, but that the decision in *Campbell* v. *Hornsby* (I. R. 6 C. L. 37; 1. R. 7 C. L. 82, 540) was based upon a distinct ruling that on the true construction of the Kingstown Harbour Acts the *status* of the Commissioners was not that of agents of the Crown, but of local Commissioners, and therefore public trustees in that particular capacity. [His Lordship read the judgment of Deasy, B.: I. R. 7 C. L. pp. 90, 91.]

It is admitted that if the Commissioners were appointed by warrant of Her Majesty only, and not under a statute, they would not be liable for the negligence of their subordinate officers; but here, though they are appointed under the authority of statute, they are appointed merely as agents of the Crown, and the liability of the Crown cannot be extended except by express enactment which is not here. *Qua* the Phœnix Park—the Commissioners are merely agents of the Crown, and the demurrer must therefore be allowed.

DOWSE, B., and ANDREWS, J., concurred.

Solicitors for the plaintiff: *Ennis & Son.*
Solicitor for the defendant: *M'Clintock.*

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into a public park. Sir Arthur Guinness provided funds by which the debt of £2000 was discharged. The Corporation relinquished the rent payable under the fee-farm grant, and undertook to supply water and gas gratuitously for the use of the square as a public park. The owners of the houses surrounding the square were freed from the liability imposed on them by the Act of 1814. On the discharge of the debt, and the completion of the necessary works to the satisfaction of the Commissioners of Public Works, the Lord Lieutenant was to declare "that the said square is open as a public park." Thereupon it was enacted that the square should become vested in the defendants "for the purposes of this Act," these purposes being declared by the preamble to be the opening of the square as a public park as a means of conducing to the health and enjoyment of the inhabitants of the city of Dublin. The 15th section expressly casts upon the defendants a statutory obligation to maintain the square "as an ornamental park or pleasure ground for the recreation or enjoyment of the public." Had the other provisions of the Act vested the square in the defendants as servants of the Crown, it would have been plainly unnecessary to exempt the square from liability to rates, as is done by section 22.

Murphy v. *Soady* (1) is a wholly different case. The Phœnix Park, where the cause of action arose, formed part of the hereditary estates of the Crown, which prior to the passing of the 14 & 15 Vict. c. 42 were administered by the Commissioners of Woods and Forests. By this statute the ornamental estates of the Crown, expressly including Phœnix Park (section 22), were placed under the control of a Minister of the Crown, created by the Act, and known as the First Commissioner of Works, who is responsible to Parliament for the way he discharges his duties. Under section 25 of the Act the expenses of the department and of maintaining the parks and gardens were to be defrayed out of moneys voted by Parliament, and the profits derived from the herbage were, during the life of Her late Majesty, to form part of the Consolidated Fund. The First Commissioner of Works, so long as the Phœnix Park remained subject to the control of the Commissioners under the statute, managed it as an officer of the Crown. The management of the Phœnix Park became vested in

(1) *Ante*, p. 213 n.

the Board of Works under 23 & 24 Vict. c. 42 simply as assignees of the Commissioners of Works. The position and function of the defendants in regard to the Phœnix Park were precisely the same as those of the First Commissioner of Works, whose duties and functions were transferred to them, and who was beyond all question an officer of the Crown. Thus the Phœnix Park is property managed "for the use and benefit of the Crown." Except that St. Stephen's Green is also managed by the defendants, and maintained by moneys voted by Parliament, there is no similarity between the two cases. Besides, it must be borne in mind that money voted by Parliament is not the primary fund for payment of the expenses of maintaining St. Stephen's Green. The mere fact that an institution receives a grant from moneys voted by Parliament does not render its property Crown property, or constitute the managing body servants of the Crown—as, for example, the case of the National Education Commissioners. This fact is of significance when the moneys so voted are applied in the maintenance for public purposes of property originally vested in the Crown—like the Phœnix Park—or in the discharge of public duties which fall within the province of Government. In *Harte* v. *Holmes* (1) it was held that the maintenance of pauper lunatics in Ireland falls within the province of Government, and is carried out under the direct and immediate control of the Crown; and on this ground expressly, and not on the ground of the grant made by Parliament in aid of local funds, it was decided that the occupation of District Asylums by the Board of Control was an occupation on the part of the Crown.

Reg. v. *M'Cann* (2) is quite distinguishable, because the bridge which was there held to be rate free, on the ground that it was occupied by the Commissioners of Works as servants of the Crown, was built on land which was taken by the Crown to form part of the property of the Crown, and as such was vested in the Commissioners of Woods and Forests. The work of construction was done not by a private individual, but by that "department which deals with the property of the Crown, and which executes works, or contracts for the execution of works connected with the land and other property of the Crown." The bridge was provided as

(1) [1898] 2 I. R. 656. (2) L. R. 3 Q. B. 677.

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the result of the report of a Commission appointed by the Crown. An Act was passed authorizing a fund to be provided by the Crown to meet the expenses of construction which was to be repaid out of tolls charged to the public.

When the Commissioners of Public Works hold property which is vested in them for maintenance not as trustees for the Crown, but, as in the case of St. Stephen's Green, as trustees for public purposes, they are liable to be sued for negligence: *Sharpley* v. *Hornsby* (1); *Campbell* v. *Hornsby* (2); *Westropp* v. *Commissioners of Public Works* (3); *Burrell* v. *Tuohy* (4). The circumstance that the defendants have no power to levy tolls in respect of the square cannot exonerate them from the express obligation cast upon them by section 15—to maintain the square in a proper condition.

The defendants do not plead (as was done in *Murphy* v. *Soady* (5)) that the acts complained of were done by their servants. They take the responsibility on themselves as a corporation; in so doing they have placed themselves in the same position as an individual servant of the Crown. As the Crown cannot authorize wrong to be done, the authority of the Crown affords no defence to an action brought for an illegal act committed by an officer of the Crown: *per* Cockburn, C.J., in *Feather* v. *The Queen* (6). This principle is applicable in the case of a corporation as well as in that of an individual for that reason.

The want of funds to meet damages, if awarded, is no defence to the action: *Coe* v. *Wise* (7); *Levingston* v. *Guardians of Lurgan Union* (8); *Sanitary Commissioners of Gibraltar* v. *Orfila* (9).

June 24.

PALLES, C. B.:—

This action was set down before the King's Bench Division, under Order XXV., Rule 2, for hearing upon questions of law raised by the pleadings.

The statement of claim alleges that the square, known as St. Stephen's Green, and all property belonging to its former Com-

(1) 2 I. C. L. R. 590.
(2) I. R. 6 C. L. 37; 7 C. L. 82, [540.
(3) [1896] 2 I. R. 93.
(4) [1898] 2 I. R. 271.
(5) *Ante*, p. 213.
(6) 6 B. & S. at p. 296.
(7) 7 B. & S. 831; L. R. 1 Q. B [711
(8) I. R. 2 C. L. 202.
(9) 15 A. C. 400.

missioners, were transferred to and vested in the defendants, as incorporated by the Act 32 & 33 Vict. c. 74, to be held for the purposes mentioned in the St. Stephen's Green (Dublin) Act, 1877. It then sets out section 15 of that Act, whereby it is enacted that the defendants, after its transfer to them, should "maintain the square as an ornamental park or pleasure ground for the recreation of the public," and might make, from time to time, such alterations in the arrangement, laying out, and fencing of the same as they should think fit; and that they should at all times maintain the said park and the said erections thereon, and all other things thereto belonging, in good and sufficient repair, and in a proper and ornamental condition, and *allow the same to be used and enjoyed as a public park*; and that for effecting any of the purposes of the Act it should be lawful for the defendants to accept private subscriptions from persons willing to contribute towards carrying into execution the objects of the Act.

The first cause of action then alleges that the defendants, being possessed of St. Stephen's Green under that Act, wrongfully erected and maintained certain iron structures with projecting spikes in such a manner as to be dangerous to persons lawfully using the park, whereby the plaintiff, when lawfully using the same, was pierced through the eye by one of the spikes, and thereby lost the same.

The second cause of action alleged that the defendants, being so possessed of St. Stephen's Green, negligently maintained those iron structures in a condition dangerous to persons lawfully using the park, whereby the plaintiff sustained the injuries complained of.

Thus, each cause of action is for misfeasance in relation to the discharge of an alleged public duty imposed upon the defendants by the statute.

Of the defences to these causes of action, three are alleged to be insufficient, viz.:—Those stated in the 6th, 7th, and 9th paragraphs of the statement of defence.

The 6th alleges that St. Stephen's Green is vested in the defendants as trustees, officers, or servants of the Crown, and that they did the acts complained of *as such* trustees, officers, or servants, and not otherwise.

The 7th alleges that the defendants have received no money

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under the Act of 1877 applicable to the purposes of that Act, that the expenses incurred by them in carrying it into execution are solely defrayed out of moneys provided by Parliament, and that Parliament has provided no moneys out of which the plaintiff could be paid the damages (if any) recovered by him in this action.

The 9th paragraph alleges that the defendants have no power to levy tolls or charges in respect of St. Stephen's Green, nor are any moneys or revenues of any sort, other than moneys voted by Parliament, received by them in respect thereof, and that they have no property or moneys for payment of the damages (if any) which may be recovered by the plaintiff in this action.

Of these defences, those stated in the 7th and 9th paragraphs are conversant with the moneys or property *actually received* by the defendants, as distinguished from those *receivable* by them, *i.e.* which they are capable of receiving in their corporate capacity; and, in my opinion, they do not afford any defence to the claim, provided that claim contains any cause of action good in law against the defendants. I think that this is settled by *Coe* v. *Wise* (1).

Proceeding then to the 6th and only remaining paragraph, I have to observe that it does not accurately raise the main question which has been argued. To hold that paragraph as pleaded good on the assumption that the statement of claim disclosed a good cause of action would involve a violation of the principle that the wrongful act of its servants cannot be imputed to the Crown, and, therefore, cannot be said to have been done *as servant* of the Crown.

The acts complained of are alleged to have been those of a corporate body, and that allegation involves a statement of the capacity of that body to commit those acts in its corporate capacity. The case of the defendants is that, in their corporate capacity (at least so far as respects the duty which is the basis of the causes of action), they are mere servants of the Crown. If this be so, as the acts complained of are wrongful, they cannot be, and are not in law, those of the defendants *as* servants of the Crown. The defendants contend that such acts are therefore not the acts of

(1) L. R. 1 Q. B. 711; 7 B. & S. 831.

the defendants in their corporate capacity, and therefore are not such as are capable of supporting this action. Nevertheless, this 6th paragraph of the defence, in express terms, negatives its basis, by insisting that the acts so complained of are those of the defendants *as servants* of the Crown.

The real ground of defence, however, and that which has been argued as if it were raised by this pleading, is that *the duties* imposed by the Stephen's Green Act upon the defendants in their corporate capacity were so *imposed upon them as servants of the Crown*; and that, therefore, any liability for acts of misfeasance in relation to those duties is not upon *them*, who, as a corporation, are incapable of acting, save through others, but upon the persons who committed them. This ground of defence, although not open upon the statement of defence, can be raised by the defendants upon the claim (upon which they can fall back), and which they are entitled to show does not contain any cause of action good in law against them in their corporate capacity. Whether it does so or not is the only question upon which I think it necessary to express an opinion.

The operation of the 15th section of the statute is two-fold. It confers a right, and it imposes a duty. By enacting that the defendants shall "allow" St. Stephen's Green "to be used and enjoyed as a public park for the recreation and enjoyment of the public," it confers an *individual right* upon each member of the public so to enjoy it, subject of course to such byelaws as may be lawfully made. I am most anxious to make my opinion on this point clear; and to prevent any suggestion that I hold that the relation of the public to this park is similar to that which exists between it and some Royal parks, as, for instance, the Phœnix Park, the enjoyment of which is in law, under the revocable permission of the Crown, and not as of right. I go as far as any of my brethren in holding that the user by the public of St. Stephen's Green is a *user as of right*. It follows from this that, for the obstruction of this individual right, by an act of misfeasance (such as that complained of here) which caused damage to the plaintiff, an action would undoubtedly lie by him against the person who committed or directed such act. But such an action would be, not for breach of duty but, for nuisance, and the fact that the act

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complained of was or was not a nuisance would depend not upon a duty to maintain, but upon the existence of the public right. In cases in which there was a public right the action would lie against the wrongdoer,—the person who erected or maintained the nuisance, whether he was a stranger or the person charged with the duty. The able advisers of the plaintiff recognised this, and accordingly by their statement of claim and in their argument they have not limited their case to the existence of the duty imposed upon the defendants to "maintain and keep" the Green "in good and sufficient repair." They have based it upon the combined effect of that duty and of the public right.

In answer to this contention, the defendants say—(1) That this duty is imposed upon them solely as servants of the Crown; and (2) that for misfeasance in the performance of that duty an action will not lie. Each of these positions is contested by the plaintiff. During the hearing the questions have been argued in their inverse order, and, in considering them, it will be convenient that I should follow the same course.

I proceed, then, to consider whether an action will lie against a corporation by one who has been injured by an act of misfeasance in the performance of a duty imposed upon that corporation as a servant of the Crown. In doing so, I desire to express my obligation to Mr. Vesey Fitz Gerald, from whose able argument I have derived, as I always do from him, great assistance.

I start with the exception of the Sovereign from the rule of law, by which a wrongful act, done by a servant in the course of his employment, is in law capable of being treated as the act of his master. When the Sovereign is master, the wrongful act cannot, in law, be more than that of the servant as an individual. It cannot be his act as servant. This principle applies, whether the servant be a private person or a corporation, subject to this necessary qualification, that if the servant be a corporation, the wrongful act can be deemed its act, *i.e.* its corporate act, only if the constitution of the corporation is such that it is capable of doing such an act in its corporate capacity. If it be not so capable, the inquiry must go further, and ascertain those who, acting for or under the corporation,

actually did, or ordered the act, and it is upon *them* that the liability will rest.

Whether the constitution of a particular corporate body is or is not of such a character as to render it capable of committing particular acts must always depend upon the construction of the instrument—whether statute or charter—which created it. The general question, as well as its application to a particular class of corporations, was much discussed in *The Mersey Docks* v. *Gibbs* (1), where it was held that the proper rule of construction of statutes creating corporations for local purposes, such as the construction and maintenance of docks and works of that character, was, "that, *in the absence* of something to show *a contrary intention*, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its corporate funds shall be rendered subject to the same liabilities, as the general law would impose upon a private person doing the same thing."

Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is *prima facie* outside its powers to do anything, except for the Crown, and as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it.

Therefore, the mere fact that a corporation is constituted for the sole purpose of doing acts as the servant of the Crown appears to me to indicate such a contrary intention as, according to the decision in *The Mersey Docks* v. *Gibbs* (1), is necessary and sufficient to exempt it from the liabilities which the general law would impose upon a private person doing such an act.

This, I think, was the view taken by all the Judges of the Exchequer who heard *Campbell* v. *Hornsby* (2), and it is the actual *ratio decidendi* of my revered one-time colleague, Fitzgerald, B. He says, in giving judgment on the demurrer:—"In considering the question of liability it is, however, to be remembered that the decisions referred to recognise, though to a very limited

(1) L. R. 1 H. L. 93. (2) I. R. 6 C. L. 37.

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extent, and perhaps I may, with deference, say, in somewhat obscure terms, an exempt class of cases. Without attempting any general definition or description of this exempt class, I may, I think, venture to infer from what has been laid down that within this exempt class the present case would come, if, from a consideration of the statute here, the Commissioners are, *as such*, and *as respects the duty alleged*, in the position of mere agents of the Crown."

Deasy, B., with whom Pigot, C.B., concurred, in giving judgment (1) on the subsequent motion to arrest the judgment, says:—"It is true, as Baron Fitzgerald observes, that the decisions of the House of Lords . . . recognise an exempt class of cases, where the Commissioners are as such, and as respects the duty alleged, in the position of mere agents of the Crown."

In result, the decision there was that the defendants were liable, but although such decision was arrived at, contrary to the opinion of Mr. Baron Fitzgerald, the point of difference was, not that the exempt class was not properly described by him, but that upon the construction of the Acts relating to Kingstown Harbour the defendants there were not in relation to the duty there the subject of discussion within that class. It was upon this ground also that the decision was affirmed in the Exchequer Chamber (2).

The same exemption was applied to the Commissioners of Public Works, acting in relation to the maintenance of the Phœnix Park, in *Murphy* v. *Soady* (3) the manuscript note of which, supplied by Mr. Vesey Fitz Gerald, appears to me to be substantially correct; but I do not rely upon that case as an authority here, as it is not binding in this Court, and as I myself was a party to the decision. I merely wish to observe that the case differs from the present in this, that by the Stephen's Green statute there is, in my opinion, as I have already observed, a right given to the individual members of the public; whilst, under the statutes upon which *Murphy* v. *Soady* (3) was decided, no such right existed in relation to the Phœnix Park.

It is insisted by the plaintiff's counsel that, were the principle

(1) I. R. 7 C. L. 82. (2) *Ibid.* 540. (3) *Ante*, p. 213.

I have stated a correct one, it would involve the anomaly that a corporation might be created of such a character that a wrongful act might be committed without any person being liable for injury resulting from it. Now if by "act" in this proposition is meant, as I understand it to be, an act of misfeasance (for with mere nonfeasance we have no concern here), I admit that such a result would be an anomaly. But it does not result from the principle I have mentioned. On the contrary, consistently with that principle (which is a necessary corollary of the maxim that the King can do no wrong) the remedy for wrongful acts committed by those who are servants of the Crown is in all respects identical, and against the same identical parties, whether such persons are direct servants of the Crown or act under a corporation, which, as such, is a servant of the Crown. For, as a corporation cannot do any act save through the intervention of an individual, and as such individual is certainly responsible for the act, there must in every case be a private individual, *i.e.* an individual, not being a corporation, who is responsible for such an act if wrongful. Further, as the relation between a principal servant of the Crown and a subordinate acting under him in the execution of his office, even if the right of appointment is vested in that principal officer, is that of fellow-servant to fellow-servant, not of master and servant, the exemption of the corporation, as a servant of the Crown, from liability for the acts of those acting under it, is identical with the exemption (established in *Lane* v. *Cotton* (1) and cases of that class) of a principal officer of the Crown from liability for acts of his subordinates.

I proceed now to the second question: whether the duty imposed by the Act of 1877 upon the defendants is so imposed upon them as servants of the Crown. To determine this, it is necessary to consider as well the 32 & 33 Vict. c. 74, which incorporates the defendants, as the Act of 1877.

Prior to the first mentioned Act the Commissioners of Public Works in Ireland were, as they are now, well-known officers of a Government department, holding office under, and during the pleasure of, the Crown, with salaries payable out of moneys voted

(1) 1 Ld. Raym. 646; 1 Salk. 17.

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by Parliament; and upon them, as such servants of the Crown, various duties had been imposed by a vast number of statutes. That Act recites that it had been usual that lands in Ireland, *required for various departments of the public service* should be taken by the Commissioners, either by way of grant in fee-simple or by demise for some less estate, and it had been customary for such grants and demises to be vested in the secretary for the time being of the Commissioners, his heirs, executors, administrators, and assigns, which was found inconvenient, and that "therefore it is expedient to remedy such inconvenience in the manner hereinafter expressed"; the Act then, by section 2, constitutes the Commissioners a corporation; and in consequence of a case to which I shall be obliged to refer, I wish to emphasize that it is so constituted a corporation for a limited purpose "for the purposes of the Act, and of taking, acquiring, and holding any land in Ireland required for any department of the public service, or for any public purposes." Section 4 enacts that all lands vested in the then present or any former secretary, or their heirs, &c., and held in trust for any such public department, or on any public trust, or for the use and benefit of the Crown, "shall vest in the Commissioners as such corporation, to be held to such and the same uses, and upon such trusts and purposes, to and upon which the same were held respectively, previous to the passing of this Act."

Now, lands held in trust for any public department are undoubtedly held in trust for the Crown, and thus two of the three classes of land which the corporation was empowered to hold were Crown lands; and the purpose indicated in respect of them, to hold them in trust for the Crown, was a Crown purpose. Further, the mischief which it was the object of the statute to remedy was confined to Crown lands, indeed to one particular class of Crown lands—those "required for departments of the public service."

It is said that the words "on any public trust," in section 2, are not necessarily confined to Crown purposes, but are capable of embracing such purposes of local, or limited, public character, as in *The Mersey Docks* v. *Gibbs* (1) were distinguished from Crown

(1) L. R. 1 H. L. 110.

purposes; and that therefore it should be held that the corporation was not, as such, a mere servant of the Crown. I do not think it necessary to decide the exact meaning which is to be put upon those words. To do so it might be necessary to have the particulars of the various parcels of lands vested in the successive secretaries of the Commissioners of Public Works, and to consider the statutes which relate to them. Having regard to the powers the Commissioners had to advance public moneys, under particular circumstances, to grand juries and private individuals, I think it highly probable that lands were vested in some of the secretaries as a security only for moneys of the Crown, and it will be observed that the description in section 4 of the lands which had actually been vested in the secretaries of the Commissioners includes those held "on any public trust." These last-mentioned lands plainly must have been taken by such secretaries as servants of the Crown. The statute, therefore, contemplates that lands within this description, the widest contained in the Act, not only might be, but were, held by a servant of the Crown as such.

Section 5 is very peculiar. It enacts that the Commissioners, as incorporated, shall be entitled to the *benefit* of all covenants, &c., transferred to them, and on the part of the grantors or lessors to be performed, and empowers Commissioners to maintain actions grounded upon such covenants in their own name "as such corporation as aforesaid"; but when the section proceeds to legislate as to the covenants upon which the Commissioners should be *liable*, whilst it transfers the burden of these covenants to the Commissioners, it does not contain any provision correlative to that which I have mentioned in respect of actions by them, nor does it authorize actions upon such covenants to be maintained *against them*.

Lord Justice Walker has referred us to a case decided since the argument, which is material to be referred to in this connexion—*Graham & Son* v. *Commissioners of Works and Public Buildings* (1). It was an action against the defendants, who were incorporated by the Crown Lands Act, 1851, and the Works and Public Buildings Act, 1874, to recover damages for breach of contract, and for

(1) 17 T. L. R. 540; [1901] 2 K. B. 781.

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wrongful conversion of plant and building materials. The defendants objected that there could not be any claim in the action on the contract, and that such claim could be put forward, if at all, only by a Petition of Right. It was there held by Ridley and Phillimore, JJ., that the action was maintainable; but the decision was founded, not upon the Act of 1851, by which the defendants were incorporated for certain limited purposes, including that of taking and holding certain lands (an Act which may be treated as substantially equivalent to the 32 & 33 Vict. c. 74, here under consideration), but upon the 37 & 38 Vict. c. 84, by the second section of which they were declared to be a corporation *to all intents and purposes*. Whether this decision be or be not sustainable—a matter into which I prefer not to enter—it seems to me not to have any bearing upon the question here.

In result, then, the individuals who, from time to time, were to constitute the corporation, were servants of the Crown, and it was as such servants they were constituted a corporation. The object of their corporate constitution was a purpose of State administration—that is, a Crown purpose—to remedy the inconvenience of lands required for various departments of the public service, and lands on the security of which public money had been advanced, being so vested that, upon the death of an official, they might pass to his representatives. No moneys whatsoever were provided for them, nor have they capacity to hold property which could be made available for any damages or costs which were recovered against them—I mean capacity under the Act (32 & 33 Vict. c. 74). These circumstances, and the marked distinction to which I have called attention, in the 5th section, between actions by them and actions against them, between the express enabling provision in reference to one, and the absence of enactment as to the other, taken together, appear to me to demonstrate that the corporation, as constituted, was a mere servant of the Crown, and that the Legislature intended that the only obligations to which it was capable of becoming liable, viz. those incident to the lands vested in them, should be enforced, not by action, but by the constitutional method of enforcing obligations of Crown servants under contracts by them as servants of the Crown, namely, by Petition of Right.

Mr. Justice Madden is of opinion that "the character in which the defendants hold any particular property, and the obligations to the public imposed by them, depend, not on any general considerations," such as I understand he considers those arising from this Act of 1869, "but on an examination of the special legislation applicable to it, in the present case, the Act of 1877."

To a certain extent this is true. Whatever may be the construction of the Act of 1869, it was undoubtedly competent to the Legislature, by the subsequent Act of 1877, to have altered it in any mode which they thought fit. An example of such alteration may be found in the Act 37 & 38 Vict. c. 84, to which I have referred in connexion with *Graham* v. *Commissioners of Works* (1). So, too, Parliament, if it thought right, might have imposed upon the defendants obligations to private individuals which would have been inconsistent with their character of Crown servants, and to this extent altered that character in relation to the lands the subject of the Act. But in determining whether it has so altered the constitution of the corporation, or imposed upon it such new obligations as to change its character as a Crown servant in relation to the lands in question, I cannot leave wholly out of consideration or regard as a neutral fact, the character which the corporation acquired at its creation, and which it continued to bear until, and at the time of, the Act of 1877.

I now come to the Act itself. By it two objects were intended to be, and were in fact, effected. First, by it, Parliament, on the part of the public, accepted the munificent offer of Lord Ardilaun to provide and equip St. Stephen's Green as a park for the recreation of the public, and made provisions under which that park has since become dedicated in perpetuity to that purpose. It is right, however, in consequence of some of the observations made in the judgment below, to see the exact mode by which that first object was accomplished. It was by the extinguishment of all former estates and interests in the park, and of all rents and charges upon it, and by vesting the fee-simple thereof free from incumbrances, and with a Parliamentary title, in the defendants in their corporate capacity, "to allow the same to be used and enjoyed as

(1) 17 T. L. R. 542; [1901] 2 K. B. 781.

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a public park." There was no transfer of the land subject to an existing obligation. There were no existing duties the obligation whereof was transferred, as there were in the statutes the subjects of discussion in *Campbell* v. *Hornsby* (1), *Burrell* v. *Tuohy* (2), *Sharpley* v. *Hornsby* (3), and cases of that class. With the single exception of the liability imposed by section 12 in reference to actions which should be pending against the former Commissioners immediately before the transfer, the rights or liabilities of the old body of Commissioners were not transferred to the defendants. In reference to this 12th section, I have to remark that it is, by express words, limited in its scope to certain specified matters, matters as to which it is apparent, from the purview of the whole Act, it was expedient that they should be substituted for the former Commissioners. To any greater extent, to anything outside this section, the defendants here had no concern with those former Commissioners.

So far as to the first object. But this was one only of the objects of the Act. The persons who had effectually dedicated the park to the public in perpetuity did not profess to provide for its maintenance, but on the contrary so dedicated it, as is apparent from the Act, upon the terms that its future maintenance should be provided for. This necessarily would involve expense. The second object then of this Act was (*a*) to secure the proper maintenance of the park, and (*b*) to provide the funds necessary for that purpose. The obligation of maintaining it was imposed upon the defendants, a corporate body which then was a mere servant of the Crown, and I cannot doubt that, *prima facie*, it was so imposed upon them, in their only then existing character, as such servant. In my view, having regard to their character at the time of the statute, it is necessary, in order to show that the duty is imposed upon them in some other character, to gather from the statute an affirmative intention to do so. I do not think it is sufficient to say that there are no words in the statute that would actually prevent the duty being imposed upon them otherwise than as servants of the Crown, although I

(1) I. R. 6 C. L. 37; 7 C. L. 82, 540. (2) [1898] 2 I. R. 271.
(3) 2 I. C. L. R. 590.

propose to go the length of showing that the statute does contain such words.

We have now to see what provision was made as to the expense of the maintenance of the park. This is the subject-matter of four provisions in the statutes, viz. sections 7, 14, 15, and 21.

Section 7 vests absolutely in the defendants "all property of whatsoever description belonging to the existing Commissioners in their capacity as such Commissioners."

Section 14 imposes upon the Corporation of Dublin the obligation of supplying water and gas.

Section 15 empowers the defendants "to accept private subscriptions from persons willing to contribute towards carrying into execution the powers of the Act."

Section 21 provides that the defendants shall defray "such of the expenses incurred in carrying this Act into execution as cannot be defrayed out of moneys received under this Act, or applicable to the purposes of this Act, out of such moneys as may be provided by Parliament for such purposes."

Having regard to these provisions (*inter alia*), I hold that the statute contains a statutable bargain between (1) the public at large, represented by the Legislature; (2) Sir Arthur Guinness, whose liberality, in providing the necessary capital expenditure, made feasible the project carried out by the statute; and (3) the Corporation of Dublin, who contributed to the annual expenditure necessary for maintenance, to the extent of the amount of their fee-farm rent extinguished by the statute (£300 a-year late currency), and the value of their annual supply of water and gas. The bargain was that, subject to such aid, contingent in its nature and uncertain in its amount, as might be derived from the property—other than the Green itself—of the former Commissioners, and private subscriptions, the expense of the maintenance (except the cost of water and gas), should be borne by the public by means of moneys to be provided by Parliament.

The moneys to be derived from the property of the former Commissioners, and such private subscriptions as might be received, are dedicated "to the purposes of the Act," and to the extent to which any portion of these moneys shall be applied to answer for

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the wrongful acts of the defendants, to the same extent exactly will be increased that portion of the expenses which under section 21 are "to be defrayed out of such moneys as may be provided by Parliament for such purpose." For that reason, considerations arising from these sources of income may be eliminated, and the case treated as if they did not exist, as the ultimate liability of the maintenance must fall on the public.

The concluding part of section 21 supports this view. It enacts that the accounts of "all moneys" (including those from these two sources) "expended by the Commissioners under this Act, shall be subject to the provisions of the Exchequer and Audit Department Act, 1866." This statute deals with accounts between the State, which is synonymous, in this connexion with the Crown, and shows that Parliament considered that all moneys received by the defendants under the statute, including those derived from these two private sources, should be so received by them *as servants of the Crown.*

Now, every sum voted by Parliament is, in theory, an aid to the Sovereign, although it is dedicated by an appropriation Act to a particular purpose. The money so voted, so long as it remains in the Treasury, is the money of the Sovereign. I will not labour this subject, which is fully discussed in the well-known case of *The Queen* v. *The Lords of the Treasury* (1). Whilst it is in the hands of the Treasury, the indicated purpose does not affect it as a trust; persons for whose benefit it is intended to be applied are still strangers to it. When handed over by the Treasury to a particular department of the State, to be applied in accordance with the purpose of a particular vote, the money remains in the hands of that department as a servant of the Crown, and is money which, in law, has been handed over by the Sovereign to its servant for that purpose. Therefore, the 21st section is an enactment that, subject to the aid I have mentioned, the sums necessary for maintenance shall be provided by the Crown. This, in my view, is not only consistent with, but almost necessarily results from the scheme of the Act as a whole. The park is given to the public, to the public generally, without any restric-

(1) L. R. 7 Q. B. 387.

tion as to locality or class, to the public in the widest sense in which that word is known—the public, which in that sense has no legal existence, save in the Sovereign, who represents it. Presumably, property so given is to be maintained by those to whom it is given; and, accordingly, the provision is that it shall be maintained by the Crown, who represents that public to whom it has been so given.

Pausing here for a moment, I have to refer to the opinion of Mr. Justice Madden, that "the circumstance that public money is voted *in aid* of a public undertaking . . . cannot convert the body in which it is vested into officers or servants of the Crown." In this general proposition, as, indeed, in most of the general propositions in that most attractive judgment, I agree. I agree that the mere circumstance that public money is voted in *aid of* "a public undertaking," by which I understand is meant something different from a corporate servant of the Crown, would not, *per se*, change its character and make it a servant of the Crown. An industrial school receives public money on a fixed scale, in proportion to the number of its pupils, and its manager does not, by reason of such receipt, become a servant of the Crown; and if I venture to criticise the application of this principle to the present case, I do so only to point out two things: (1) that here the public money, for the reasons I have already pointed out, is contemplated by the statute to bear the ultimate burthen of *the whole deficiency* in the expenditure which the other sources of income are insufficient to meet, the sums received under sections 7 and 15 being themselves no more than sums received *in aid* of the Crown; (2) the question here is not whether this circumstance, *per se*, will have the effect indicated; it is but one of several, and it is used not to "convert" or change the character of the corporation. It is used, not to support, but to rebut, the attempted inference of change of character.

Thus far I have endeavoured to establish three matters: first, that the park was to be maintained by a body who were, in fact, Crown servants; second, that it was to be so maintained by them at the expense of the Crown; third, that the sums received by them for such maintenance were to be so received and expended by them as servants of the Crown, and to be accounted for by

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them as such servants. These three matters, taken together, go a long way to show, if indeed they do not conclusively show, that the maintenance was to be by them as servants of the Crown.

But the matter does not stop there. I pass by section 22 as to exemption from rates as too small a matter to be adequate, by its own force and unaided by any other circumstance, to rebut the inference which would otherwise be raised from all the matters I have mentioned, and I come to the one circumstance, which is most relied upon by the plaintiff — a circumstance, however, which, in my view, instead of helping him is against him. I refer to section 15, which is alleged to show that the defendants are not servants of the Crown, because by it is imposed upon them a duty to the public which is said to be inconsistent with their character of Crown servants, and, therefore, to impose a duty upon them in a different character.

Now this section enacts, *inter alia*, that the defendants "shall maintain St. Stephen's Green as an ornamental park or pleasure ground for the recreation and enjoyment of the public, and may, with the consent of the Treasury, erect lodges, ornamental buildings," &c., "and may, with the like consent, provide ornamental fountains," &c., "and employ such gate or lodge keepers, and other necessary officers and servants for the order and management thereof, and, subject *to the powers aforesaid*, maintain and keep it in good and sufficient repair, and in a proper and ornamental condition."

I call attention to these words for three reasons:—First, to point out what has already been shown in the able judgment of Mr. Justice Barton, that this power of the Commissioners of the Treasury, as Government servants, dominates a large portion—although I admit not the entire—of the duties here prescribed. Secondly, to ascertain to whom is due the duty to maintain, which is imposed upon the defendants by the section? Thirdly, to determine whose servants are the gate and lodge keepers, and other necessary officers and servants?

As to the first, I deem it unnecessary to add anything to what has been said by Mr. Justice Barton. As to the second, which is the important matter, Mr. Ronan at once gives an answer to the

question, to whom is due the duty to maintain? and he answers rightly, "to the public." But a duty may be due to the public in either of two senses. It may be due (1st) to each particular member of the public, or to each particular member of a class of the public; or (2ndly) it may be due to the public as an indivisible whole, the aggregate of all the persons who, in their totality, make up the public. A duty due to the public in one or other of these senses has a different legal signification. In which of these two senses is the word "public" used, when it is said that the duty to maintain is a duty due to the public? I shall take an example of each class in order to make my meaning clear.

As an example of the first class, I shall take a duty such as that in *The Mersey Docks* v. *Gibbs* (1)—a duty to a shipowner, due by the owners of docks or harbours, to a shipowner whose vessel has entered the harbour or dock under their control. In such a case the duty to the shipowner arises, not merely because he is one of the public, but, because, being one of the public, he has paid, or has become liable to pay, tolls in respect of his ship entering the harbour or dock. Therefore there is a particular duty due to him, and he can sue for breach of that particular duty, if it result in damages.

As an example of the second class, I take a familiar one—the duty due to the public by an ordinary road authority—a duty which appears to me to be very analogous to that under consideration.

Now within which of these two classes is the duty which is imposed upon the defendants by section 15? The answer to this question, I apprehend, is not involved in any doubt; because it cannot be disputed, and it was assumed as undoubted by Mr. Justice Madden in his judgment below, that the defendants here, although not an elected body, are within the class which, in the series of well-known authorities—from *Russell* v. *Men of Devon* (2) to *Cowley* v. *Newmarket Local Board* (3)—were held not to be liable to an individual who sustained damage by reason of non-performance by them of a common law or statutable duty to maintain. In such a case it is admitted that the only remedy is by indictment.

(1) L. R. 1 H. L. 93. (2) 2 T. R. 667. (3) [1892] A. C. 345.

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Now, what is involved in the application of this rule to the present case? If, in such a case, the obligation to maintain were due by the defendants to each of the individuals who in the aggregate compose the public, it would necessarily follow that an action would lie at the suit of any individual injured by non-performance; just as the action lay in *The Mersey Docks* v. *Gibbs* (1) by reason of the breach of the particular duty due to the shipowner who had paid or had become liable for the dues. In such a case there would be a breach of a duty due to the plaintiff, and particular damage resulting to him therefrom. It, therefore, necessarily follows from the fact that such an action does not lie, that in such a case the duty cannot be due to each member of the public. But, further, as an indictment will lie, the obligation to the public must be an obligation to the public generally—to the public, in the sense in which it is represented by the Crown, because otherwise an indictment would not be the appropriate remedy; the duty, therefore, is one within the second class. That is, the duty in respect of which the misfeasance complained of here was committed was an obligation due by the defendants to the Crown, and to the Crown only.

From this two things follow:—1st, that the allegation that the character imposed by the statute on the defendants is inconsistent with the duty in question being imposed on them as Crown servants wholly fails. The inconsistency insisted upon was that, that the statute threw upon the defendants an obligation to private individuals, which it was said, and I think rightly said, would be inconsistent with their position as Crown servants. The answer that I give to that is, that the duty was due, not to any individual in particular; it was due to the public in the sense in which the public is represented by the Crown only. There is, therefore, no such inconsistency as is alleged. The duty is in accord with their former character. A new duty to their master the Sovereign is imposed upon them (the corporation) as his servants.

To sum up, I have (1) a duty to the Crown; (2) imposed upon a body who, immediately previous to the time of such imposition, was a servant of the Crown; (3) a duty to be performed with

(1) L. R. 1 H. L. 93.

moneys to be received from the Crown; (4) in pursuance of a statutable *quasi* obligation accepted by the Crown to provide such moneys; (5) and which moneys are to be accounted for by that body as a servant of the Crown. From these circumstances, in my opinion, the conclusion irresistibly follows that such duty is by the statute imposed upon the body in question as a servant of the Crown.

For these reasons, which are in substance those of Mr. Justice Barton in the King's Bench Division, re-stated and elaborated at much too great length, but so re-stated out of sincere deference to those from whom I have the misfortune to differ, I am of opinion that this action does not lie against the defendants in their corporate capacity. Consequently, whilst entertaining the deepest sympathy for the plaintiff, who has been so grievously injured, I feel bound to express my opinion that the order of the King's Bench Division ought to be reversed, and that judgment upon the entire record should be entered for the defendants.

FITZGIBBON, L. J.:—

In the judgment of the King's Bench Division, and the arguments of counsel in this Court, we have been referred to upwards of fifty authorities and statutes. In the view which I take of the case, its decision must turn upon one definite point. To eliminate extraneous matter, and to fix with precision the true test of the defendants' liability, is a task of no small magnitude, but when it is performed, I think it will be found that the great majority of the cases to which we have been referred, and many of the questions and considerations which arose in all of them, will have disappeared from our view.

The ultimate question, as I now understand it, may be shortly put, upon the facts which are admitted on the pleadings, or appear upon the statutes. It is a question of law—Was the act of the defendants, of which the plaintiff complains, an act of the Crown, and, as such, one which falls within the protection of the rule that "the Crown can do no wrong"? Put as a question upon authority, it may be stated in the form—Are the defendants liable for that

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act as coming within the principle upon which the trustees of the Mersey Docks were held liable in *Gibbs' Case* (1), and upon which these same defendants were held liable in *Campbell* v. *Hornsby* (2), or, on the other hand, do they as servants of the Crown fall within the exception—the exempt class—defined by Blackburn, J., in *Gibbs' Case* (1). We must define the principle of the exemption and the extent of its application, in order to determine whether the Commissioners of Public Works in Ireland are entitled to its benefit. We may seek help from other instances, especially those in which this exemption has been claimed by the defendants themselves—with success, as in *Murphy* v. *Soady* (3)—or unsuccessfully, as in *Campbell* v. *Hornsby* (2), *Sharpley* v. *Hornsby* (4), *Westropp* v. *Commissioners of Public Works* (5), and *Burrell* v. *Tuohy* (6).

There are also instances of a similar claim put forward with opposite results of other more or less limited bodies and persons; of these the nearest in analogy to the present case, or those in which observations most nearly touching this case may be found, are *Gilbert* v. *The Corporation of Trinity House* (7), *Sanitary Commissioners of Gibraltar* v. *Orfila* (8), *Raleigh* v. *Goschen* (9), *Wood* v. *H. M. Commissioners of Works* (10), and *Graham* v. *The English Commissioners of Works* (11).

The first rule for investigating such a case as this is that the defendants are a corporation created by statute, whose character, duties, and liabilities must be ascertained from the statutes which created them, and under which they act. Three statutes only appear to me to be material. (1) The St. Stephen's Green Act, 40 & 41 Vict. c. cxxxiv. (2) The Act 32 & 33 Vict. c. 74, which is by the St. Stephen's Green Act referred to as defining the manner in which the Commissioners were to be treated as incorporated for the purposes of the St. Stephen's Green Act, and (3) the Exchequer and Audit Department Act, 1866, which the St. Stephen's Green

(1) L. R. 1 H. L. 93.
(2) I. R. 6 C. L. 37; 7 C. L. 82, [540.
(3) *Ante*, p. 213.
(4) 2 I. C. L. R. 590.
(5) [1896] 2 I. R. 93.
(6) [1898] 2 I. R. 271.
(7) 17 Q. B. D. 795.
(8) 15 A. C. 400.
(9) [1898] 1 Ch. 73.
(10) 31 Ch. D. 608; 45 S. J. 539.
(11) 17 T. L. R. 540; [1901] 2 K. B. 781.

Act, sect. 21, applies to the accounts of all moneys expended by the defendants under the St. Stephen's Green Act itself. The Audit Act is material only in its bearing upon the arguments put forward by the defendants with reference to the funds applicable to the purposes of the St. Stephen's Green Act.

These arguments have been put forward (1) to establish the immunity of the Commissioners upon general grounds, and (2) in support of a distinct defence, which, resting upon inability to pay damages, must be separately considered.

The "points of law" must for the present be decided, not upon facts proved, but upon the version of facts given in the pleadings. I greatly fear that the object of the consent by which the case is presented in this manner will be disappointed. A decision in favour of the defendants would no doubt have ended the action, but a decision in favour of the plaintiff leaves both parties where they were, with all their difficulties still before them, but under the added expense of a useless preliminary encounter. The same thing occurred under the old system in *Campbell* v. *Hornsby* (1), where a demurrer to a defence which raised a somewhat similar point of law was overruled, but when the case afterwards came to trial the Commissioners failed to prove the defence in fact.

In *Raleigh* v. *Goschen* (2) the same course was taken which has been taken here, and succeeded; but if the plaintiff had there joined other defendants, or even sued the then defendants individually as well as in their official capacity, the action could not have been finally decided. The order was made without prejudice to further proceedings, and the same action might have been allowed to proceed, but that an amendment was refused, because it was asked for under circumstances which the Court did not think sufficient to justify it, as the alternative for issuing a new writ and commencing a separate action against the same or other defendants for the same cause of action, alleging it against them as individuals.

I fear that the result of this case will give reason to regret that the action was not tried in the ordinary course, leaving the

(1) I. R. 6 C. L. 37; 7 C. L. 82, 540. (2) [1898] 1 Ch. 73.

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rights of the plaintiff and the liability of the defendants to be ascertained in accordance with facts found by a jury, instead of deciding points of law upon the allegations of pleaders.

But we must take the facts from the pleadings. As pleaded, what is the cause of action? It is two-fold—

(1) The wrongful erection and maintenance by the defendants of a structure dangerous to persons lawfully using St. Stephen's Green, whereby the plaintiff lost his eye, and

(2) The breach by the defendants of the statutory duty imposed upon them by the St. Stephen's Green Act, sect. 15, of maintaining St. Stephen's Green as a pleasure ground for the enjoyment of the public, and of maintaining it and the erections thereon in a proper condition for the recreation of the public.

The cause of action alleged is not mere negligence, it is not nonfeasance, it is the affirmative act of erecting a dangerous nuisance in a public place, and the affirmative act of violating an active statutory duty.

The moment this is seen, there disappear from this case the leading considerations which occupy the larger part of the arguments and judgments in almost all the authorities which have been cited.

We have to deal with a wrongful act, a tort in the strict sense, and with nothing else.

Furthermore, this wrongful act is alleged to be the act of the defendants. The defendants are a statutory corporation. As such, they must necessarily do many acts, not by themselves as a corporation, but through servants or through others who, though not servants of theirs, may be servants of the Crown, or may be independent officers, if the contention of the defendants is sustained; but if I view the case rightly no question whatever arises now upon such considerations as these.

In the argument, and also, I think, in one at least of the judgments in the Court below, there has been some ambiguity in speaking sometimes of the "official" capacity, and sometimes of the corporate capacity of the defendants, but I hold that for our purpose, and on these pleadings, the defendants have no capacity except that of a corporation.

The wrong complained of, if done at all, must be taken to have

been done by the corporation, *i.e.* by the defendants in their corporate capacity.

We have nothing to do with the suggestion that the individual members of the corporation can be held liable.

If the defendants in their corporate capacity are not liable, the fact that they are a corporation must be taken into account in determining whether their "official capacity" is sheltered by the immunity of the Crown, but upon these pleadings it is immaterial for any other purpose; to bear this in mind will again get rid of a further instalment of the mass of difficulties and the maze of questions discussed in other cases.

There is nothing to prevent the Crown from being served by a corporation, and there is nothing to prevent a corporation from claiming any immunity to which an individual is entitled. Whether an act of a corporation, done in the exercise of its statutory powers, is or is not an act of State must, in my opinion, be determined upon exactly the same principles upon which the character of an act, and the liability of the doer of it, should be determined in the case of an individual, always provided that the act is one which it is possible for the corporation to do.

That the act of erecting the alleged nuisance was an act done by the defendants in their corporate capacity is upon my reading of these pleadings admitted here, and therefore we must deal with the case in the same way as if the maintenance of St. Stephen's Green had been confided either to the members of the Board of Works as so many men, or to some individual officer, or to any other individual or combination of persons.

In any case the act of violating a statutory duty must be the act of the body or person, as the case may be, on whom the law has laid the duty. To hold the defendants incapable here of violating their statutory duty because they are a corporate body, would necessarily lay down, as a rule of law, that no corporation is capable of disobedience to the law. To hold on the same ground that a corporation could not commit a nuisance, would be an extension to corporations of a legal incapacity to do wrong for which I can find no authority.

The plea that an act has been done by a defendant as a servant of the Crown must be equally good or equally bad for a

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corporation and for an individual; always reserving, however, the consideration whether the fact that the servant is a corporation alters the character, or gives evidence of the character, of the service.

I repeat that the tort alleged is a wrongful act of the incorporated Commissioners done by them in their corporate capacity. Except in that capacity, they have no existence. On this argument the doing of the act is admitted, and the defendants are estopped from denying that the doing of it was not within their capacity. I will not use the words "corporate capacity" again throughout my judgment; and when I speak of the Commissioners in their "official capacity," I must be taken to mean their alleged capacity as servants of the Crown, contrasted with their capacity as a body subject to the ordinary law, and with no reference to the individuals who compose the Board of Works. These individuals are not before the Court in any shape or form; it is not alleged or suggested that any of them did anything to injure the plaintiff; and it must be taken that the purchase and the erection of the structure complained of, and the violation by the defendants of their statutory duty, were corporate acts of the defendants as constituted by the St. Stephen's Green Act.

The defences now in question are two-fold, and one of the two is put in two ways. The first defence is that upon which the Lord Chief Baron has based his judgment. Barton, J., seems to me to rest on both.

Defence No. 1 is that St. Stephen's Green is vested in the defendants as trustees for and as officers or servants of the Crown, and that they did the wrongful acts as such trustees servants or officers, and not otherwise.

Defence No. 2 is rested on the money question, and it seems to me to be but one in substance, though put in a double aspect in point of law. (*a*) The defendants have received no money under the St. Stephen's Green Act applicable to the purposes of that Act, and the expenses incurred by them in carrying that Act into execution are solely defrayed out of moneys provided by Parliament for such purposes, and Parliament has not provided moneys for payment to the plaintiff, or out of which he could

be paid any damages in case such should be recovered against the defendants. (*b*) That the defendants have no power to levy tolls, nor are any moneys other than moneys voted by Parliament received by them in respect of St. Stephen's Green, and the defendants have no property or moneys for payment to the plaintiff, or out of which the plaintiff could be paid any damages.

As pleas of impecuniosity merely, such pleas are clearly bad; their only materiality for our purpose arises upon the question how far the public character of the funds devoted to the maintenance of St. Stephen's Green supports the first defence, and goes to show that the defendants are servants of the Crown. I shall have to point out my grounds for holding that these money defences are false in fact. I shall also have to state my reasons for holding that the administration of funds provided by Parliament is, in point of law, consistent with the liability of the administrators as subjects of the Crown; but for the present I must deal with these defences in their bearing upon the first and main defence—that which is supported by all the strength of the authority of the Chief Baron—and to that defence I now address myself.

What is its foundation? That the acts were done by "servants of the Crown"—that the act of a servant is the act of his master—that the Crown can do no wrong—and therefore that the act done by the Commissioners of Public Works was an act of the Crown.

Mr. Fitz Gerald, in his full and able argument, put his case in strong terms, but I think the defendants have to go the full length of his contention. He said: "In managing St. Stephen's Green the Board of Works are exercising 'regal' powers." I can put no lower meaning upon this than that the erection of the nuisance and the violation of the statutory duty which injured the plaintiff were done by the Crown—in short, that for the purposes of this action the Crown did what is complained of, through the instrumentality of the Board of Works.

My first answer to this contention is that it is inconsistent with the express words of the statute, which imposes the duty which was violated upon the Commissioners, and not upon the Crown. My second is that it seems to me to be *prima facie*

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inconsistent with the constitutional antidote provided by our law for the otherwise unjust result of the maxim that the Crown can do no wrong. In *Feather* v. *The Queen* (1), Cockburn, C.J., says: "Let it not be supposed that a subject sustaining a legal wrong at the hand of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. Counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of State for an injury done by authority of the Crown, but he altogether failed to make good that position; he cited three cases as 'direct authorities' that an action will lie for a tortious act notwithstanding it may have had the sanction of the highest authority in the State, but in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow-subject though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand and the rights and liberties of the subject on the other." Of course these words do not apply to acts of the Crown done through its servants, but they state the principle.

There is no *prima facie* reason for refusing to apply this principle to a corporate servant of the Crown. Corporations are subjects of the Crown; corporations may be servants of the Crown; and in my opinion any judgment which confers immunity upon the Board of Works because they are a corporation, which they could not have if they were an aggregate of individuals, a *quasi* corporate body, or an officer of State, is without authority to support it, or it begs the whole question at issue.

Whether the Board of Works are servants of the Crown in the sense which alone is material here—namely, so as to make their acts acts of the Crown—whether they are within an exception, or belong to the exempt class mentioned in *Gibbs' Case* (2), depends on the statutes by which they are constituted. They are well

(1) 6 B. & S. at p. 296. (2) L. R. 1 H. L. 93.

described by Fitzgerald, B., in *Campbell* v. *Hornsby* (1) as a "very well-known multifarious body"; but we have only to consider the form of their incarnation under the St. Stephen's Green Act. That Act, section 6, deals with them as incorporated by 32 & 33 Vict. cap. 74, of which section 2 constitutes them a corporation "for the purpose of taking, acquiring, and holding any lands in Ireland required for any department of the public service or for any public purpose."

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If I were to search for appropriate words to mark the distinction between a servant of the Crown and an authority constituted for "public purposes" in a wider sense, I do not know that I could find better words than these.

To my mind the question is under which alternative the St. Stephen's Green Act dealt with the Board of Works. Is the Green land required for a "department of the public service," or is it land required for a "public purpose" in a wider sense?

If there be any wider sense—and our Irish Rating Acts and *Gibbs' Case* (2) prove that there is—in which the trustees of land devoted to "public purposes" are not servants of the Crown, and are liable to the ordinary responsibilities of subjects of the Crown, the incorporating Act of 1869 expressly enabled the Board of Works to be placed in that position.

Whether they were so placed or not, with respect to St. Stephen's Green, depends on the construction and effect of the Act of 1877.

Before that Act the Commissioners of the Green were trustees for the inhabitants only; the Act recites that there was "no public park" in Dublin; the Green was thereby opened for the recreation and enjoyment of the citizens, and for that purpose it was vested in the Board of Works; it was rendered "suitable for a public park" by private munificence; its suitability was, no doubt, to be effected to the satisfaction of the Lord Lieutenant; but with the Green all property of whatsoever description, belonging to the existing Commissioners, in their capacity as such, was vested absolutely in the Board of Works. All this property had theretofore been private property in the eye of the law, and I see nothing to indicate that St. Stephen's Green became in any sense Crown land

(1) I. R. 7 C. L. at p. 93. (2) L. R. 1 H. L. 93.

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or part of the domain or possessions of the Crown. Its subsequent maintenance was to be as "an ornamental park or pleasure ground for the recreation and enjoyment of the public," subject to the consent of the Treasury. The discretion of the Board of Works was the authority to decide what was suitable and proper to be done with it "for the purposes of such park or pleasure ground"; they were to "allow the same to be used and enjoyed as a public park for the recreation and enjoyment of the public, and not for any other purpose." Section 15 contains the following words, the like of which are nowhere to be found in any statute or in any authority as applicable to property of the Crown, belonging to it either as the Sovereign, or by virtue of the prerogative, or for the purpose of the public service, or devoted to any purpose connected either with the State or with the Government: "for effecting any of the objects of this Act, it shall be lawful for the Commissioners to accept subscriptions from persons willing to contribute towards carrying into execution the powers of this Act."

If servants of the Crown for one of the purposes of the Act, the Commissioners must be such servants for all those purposes. Under these words were they to "send round the hat" for the Crown?

I can conceive no language less appropriate to State property, nor any words more clearly conveying that the objects and the powers of the Act were not Crown or State objects, but were powers and objects directed to the interest of the many-headed multitude, as distinguished from the Sovereign who can do no wrong.

In our monarchical constitution, no doubt, the Crown represents the public in many cases; but I cannot agree with the Chief Baron, that what is in America called "the People," and what is there distinguished from the State or the Executive, is unrecognisable in our law; and I hold that "public purposes" here may be attained through the instrumentality of trustees who are neither ministers nor servants of the Crown, and whose acts are acts done for the benefit of the public by fellow-subjects, and not acts of the Crown itself, to which the law attributes the impossibility of their being wrongful.

The only remaining provision of the St. Stephen's Green Act

upon which the alleged immunity rests is section 21: "The Commissioners shall defray such of the expenses incurred in carrying this Act into execution as cannot be defrayed out of moneys received by them under this Act, or applicable to the purposes of this Act, out of such moneys as may be provided by Parliament for such purposes."

Our statute book is full of instances, more numerous before the Union than since, of grants of public money in aid of beneficent institutions. All the capital property belonging to St. Stephen's Green was derived from private sources; its maintenance only was to be aided by funds which *might* be provided by Parliament. Parliament was to provide nothing except the deficit, and it was left to Parliament to say whether and how far it would provide even for the deficit. This clause, in my opinion, strengthens, instead of weakens, the conclusion that the public in the popular sense, as distinguished from the Sovereign who can do no wrong, was the *cestui que trust* of the Board of Works in this matter.

Without expressing a definite opinion upon the subject, I must say that, in my opinion, the contemplation of moneys provided by Parliament as the only fund available for maintaining St. Stephen's Green would not of itself sustain the defendant's contention.

In this impression I am fortified by the provision that the accounts of all moneys expended by the Commissioners under the Act shall be subject to the provisions of the Exchequer and Audit Department Act, 1866. Under that Act, as I understand the complicated procedure, an estimate of the expenditure which it is proposed to defray, showing the purposes to which the money is to be applied, must first be submitted to Parliament, and the ultimate determination whether the proposed expenditure shall be defrayed or not out of public funds rests with Parliament, which may reduce the vote and "stop the supplies," even in the case of the King himself.

When all the expenditure of the Nation is subject to this condition, what effect can this provision have in leading to a decision that the maintenance of St. Stephen's Green is a State purpose as distinguished from the countless other public purposes for which Parliament votes money?

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Read by the light of the procedure under the Audit Act, the defence that Parliament has not provided moneys for payment of the plaintiff is an inversion of the course to be pursued in case damages were recovered by the plaintiff, and it proves too much; for even if the defendants had made a contract to expend money upon the Green, the money would not be provided by Parliament until it came to be paid. Read by the light of the provisions which vested the private capital property of the Green in the Commissioners, and which enabled them to accept private subscriptions for effecting any of the objects of the Act, the defences are untrue, if they mean that the defendants have no means of obtaining money except from Parliament; and tested by actual practice, the defences are immaterial, having regard to the numberless instances in which moneys are annually voted by Parliament to reimburse or compensate individuals for liabilities, losses, and injuries incurred either in the public service, or in the carrying out of public duties, and even in cases where private individuals have put forward claims upon the generosity or the voluntary bounty of Parliament.

The consideration of questions whether damages awarded in an action such as this would be "expenses incurred in carrying the Act into execution," whether the Commissioners could be compelled to apply to Parliament for moneys to defray such damages, whether the capital property of the Green could be made liable, and whether the rights of the public could be in any way curtailed or affected through any process of law to which the plaintiff would be entitled to have recourse in order to recover the amount of such damages, are all difficult questions; they are discussed in cases to which we have been referred, but they are all premature at the present stage of this action, and I have dealt with the statutory provision as to Parliamentary funds in the only aspect in which it is now material; namely, as an element to be considered in determining whether the Board of Works are in respect of St. Stephen's Green servants of the Crown, whose acts are the acts of the Crown, and therefore incapable of being deemed wrongful, so as to give a cause of action to a subject who has been injured by them.

If the plaintiff recovers a verdict and cannot realize the amount,

so much the worse for him; but he will be no worse than any other plaintiff who has got a judgment against an impecunious defendant. If the defendant who has acted wrongfully cannot be made to pay, the plaintiff is unfortunate, but the defendant is none the more meritorious.

It remains to see, among the multitude of authorities cited, whether the principles which I have stated are inconsistent with any decided case binding upon us. The first and main question arises upon the *Mersey Docks Case* (1). Are these defendants in *consimili casu* with the Mersey Docks Trustees, or do they belong to the excepted and exempt class whose existence is recognised in that case? The Mersey Docks were to be open to the use of the public, no doubt "paying dock rates for the use of them"; but Blackburn, J., says (pp. 105, 107): "There is nothing in the statutes either extending or limiting the liability of the Dock Trustees to those paying for the use of the docks so as to make it different from that which the general law would cast upon them under such circumstances, and consequently (he says), in our opinion, the great question in both these actions is, what is the duty which the general law does cast upon corporate trustees being the proprietors of docks maintained under such enactments?" When he lays down that "the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body the creature of the statute shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things," he rejects the contention of the trustees that, "by the general law of this country, such bodies are trustees for public purposes, and that being such they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants, or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers."

He says that the authorities "that where a person is a public officer in the sense that he is a servant of the Government, and

(1) L. R. 1 H. L. 93.

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as such has the management of some branch of the Government business," were decided "upon the ground that the Government was the principal and the defendant merely the servant."

But it was held that the defendants in that action were not servants of the public in that sense. Unless the Crown is principal, the Commissioners cannot be servants in St. Stephen's Green. The reasons which I have given appear to me amply sufficient to show that the Crown was not the principal, and consequently the Board of Works cannot be servants of the Crown, or officers of State, in the management of St. Stephen's Green.

Blackburn, J., deals with another class of cases depending upon the following principle—analogous to that under which the Crown can do no wrong—viz.: "If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful."

"The principle (he says) is that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the Legislature; but though the Legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done."

He adds—"There is a considerable number of cases in which actions have been held to lie against bodies executing works, under the authority of statutes, for the improper mode in which their powers have been executed, though the defendants did not derive any profit from the execution of the works."

In all this he is speaking of a corporation created for the purpose of maintaining works quite as public as St. Stephen's Green, and I cannot reconcile his language with the idea that he recognised any exemption in their favour from liability to damages for wrongful acts and violations of statutory duties committed by themselves. He dissents, both on principle and on authority, from the position laid down by Lord Cottenham in *Duncan* v. *Findlater* (1), that "if a thing done by such a body is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in

(1) 6 C. & F 894.

which he has thought fit to perform the work, the public funds should not be made liable to make good his private error or misconduct."

In recommending the opinion of Blackburn, J., to the House, Lord Cranworth (pp. 122–123) described the appellants as trustees for the benefit of the public, and yet holds them, as the occupiers of the docks, to be "liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit." Lord Wensleydale says (p. 124):—"The Dock Trustees do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm."

Lord Westbury says (p. 127) that "it is more reasonable that trust or corporate property should be amenable to the individual injured than that a Court of equity should protect the property of beneficiaries against the act of trustees, or that individuals injured should be deprived of the ordinary right of resorting for a remedy against the body doing wrongful acts, and should be driven to seek a remedy against the individual corporators whose decision or order in the name of the corporation may have led to the mischief complained of."

He says, with regard to Lord Wensleydale's suggestion (p. 128), that "it would be a more correct principle to hold officers of public departments not to be answerable for inferior servants; that that principle may be quite correct where an officer fulfilling a public duty is directly appointed by the Crown, and is acting as the servant of the Crown; but it has no application to the case of trustees incorporated for the purpose of public works."

I have selected these passages for quotation in order to avoid repeating quotations which define the exception from the rule laid down by Blackburn, J., because they indicate to my mind most clearly that the exception was not intended to cover statutory trustees for public purposes incorporated as the defendants here are, and that such trustees were not regarded by Blackburn, J., or by any of the Lords, as servants of the Crown within the exemption.

I shall not waste time over long quotations from *Campbell* v. *Hornsby* (1), but I must refer to that case.

(1) I. R. 6 C. L. 37.

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The judgment on the demurrer rested upon the simple ground that the pleadings alleged that the injury was done by the non-removal, by way of improvement, of the defects in Kingstown Harbour existing before the Commissioners' appointment, and for the removal of which they never had any money applicable under the statutes. As a decision it rests upon the simple principle that the measure of means is the measure of duty; the same thing was held in *Grant* v. *Sligo Harbour Commissioners* (1), and in many other cases. Commissioners cannot be sued for not doing what they have no funds to do; but Deasy, B., says that "when duty is imposed on them by the Act, and there is a failure on their part to perform that duty, and injuries result to the plaintiff from that failure, they are, under *Coe* v. *Wise* (2), to be held liable for the negligence of their officers," and *a fortiori* for their own wrongful act of violation of their statutable duty.

Fitzgerald, B. (p. 49), quotes the provisions in the Kingstown Harbour Acts by which any surplus or funds was to be paid into the receipt of the Royal Exchequer to the credit of the Consolidated Fund, towards repayment of money advanced or thereafter to be advanced out of moneys provided by Parliament.

Without attempting any definition of the "exempt class of cases," he infers (p. 51) that the Commissioners would come within that class if they were "as such and as respects the duty alleged in the position of mere agents of the Crown, or one of those known officers by whom the Crown directly exercises its prerogative, and who themselves are properly responsible for such exercise to Parliament." Having regard to the fact that the Commissioners of Public Works were for the purposes of Kingstown Harbour ultimately held liable, when it was proved that the injury was caused, not by the non-removal of natural defects, but by the negligent and improper leaving of a chiselled stone which had fallen out of the pier in a position where it injured a ship, it proves that, in that case at all events, they were not, in the words of Fitzgerald, B. (p. 56), in the position of Crown agents or of officers of State exercising the prerogative of the Crown in making Kingstown Harbour, or in their *quasi* corporate capacity

(1) I. R. 11 C. L. 190. (2) L. R. 1 Q. B. 711.

mere agents of the Lord Lieutenant, exercising with the aid of the Legislature a part of the Royal prerogative without funds to meet their liabilities. On the contrary, their true character under the legislation was that described by Pigot, C.B. (p. 68) :— "They ceased to be a mere public department under the Crown, and remained subject only to those restrictions which are always imposed upon public bodies, restraining them from making regulations which would be detrimental to the public. Subject to these restrictions they were placed in full dominion over and ownership of the harbour as public trustees, and not as officers of the Crown." He declined to presume that the advances made by the Government had been discharged, yet he refused to affirm that the funds in their hands were not applicable to the removal of obstructions. This question became essential for decision after the verdict; it was then held by Deasy, B. (1), that their position did not differ from that of the Trustees of the Mersey Docks. It is true he says that "as Commissioners of Public Works they are officers of the Crown, but they fill in addition to that a totally distinct corporate capacity as Commissioners of Kingstown Harbour, entitled to receive the same dues and bound to apply them to the same purposes as their predecessors," and with nothing to exempt them in that latter character from the breach of that obligation.

If these judgments be law, they must *a fortiori* apply to wrongful acts and violations of duty by the Commissioners, and the same principle must apply to this case, unless the Commissioners of St. Stephen's Green are less public trustees and more officers of the Crown than the Commissionera of Kingstown Harbour.

In the Exchequer Chamber, whose decision binds us, Whiteside, C.J., says (2) :—"It is not for us to fritter away such decisions as *The Mersey Docks* v. *Gibbs* (3) in the House of Lords, but to say that the principle on which the *Mersey Docks Case* was decided has a direct and pointed application to the case now before the Court. It was argued that no remedy could be afforded to the plaintiff because the Commissioners happened to be in the position of great public officers. I regard them in the same light as I do the Port and Harbour Corporation of the City of Dublin,

(1) I. R. 7 C. L. at p. 91. (2) *Ibid.* p. 547. (3) L. R. 1 H. L. 93.

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to whom it was intended to entrust the duties that have been entrusted to them. The Port and Harbour Corporation of Dublin are admittedly responsible, and it is unreasonable to contend that the Kingstown Harbour Commissioners, entrusted with important duties of the like nature, are not responsible, and that no remedy against them can be enforced."

It was argued that the Kingstown Harbour Commissioners should be regarded as officers of State, holding office directly under the Crown, and that from the nature of their appointment the action could not be maintained against them. He answered this argument by quoting *Feather* v. *Regina* (1), as I have already done.

In 1886 the English Queen's Bench Division in *Gilbert* v. *Trinity House* (2), held the Corporation of Trinity House liable for damages for injury to a ship, and held that the Corporation of Trinity House were not, by virtue of the Merchant Shipping Act, 1854, constituted servants of the Crown so as to exempt them from liability; though that corporation was by statute a general lighthouse authority, and it received dues which were carried to the Mercantile Marine Fund in aid of advances out of the Consolidated Fund. It was argued on their behalf that they were in the position of a Government Department, and that they were, within the judgment of the House of Lords, constituted for public purposes such as are required and created by the Government of the country, and therefore to be deemed part of the use and service of the Crown; yet the Court could not conceive that they represetned the Crown as servants, or that they were in the position of great officers of State, though they were an amalgamation of a vast number of bodies having authority over the lighthouses and buoys throughout the realm.

Day, J., says (p. 801):—"It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of State are, if I may say so, emanations from the Crown; they are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature

(1) 6 B. & S. at p. 296. (2) 17 Q. B. D. 795.

and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any Royal authority. In my judgment, therefore, the defendants are liable, like any other body, for their own negligence, or the negligence of their servants, for it may be difficult to see how a corporation could itself be guilty of negligence."

We are free from that difficulty, for we have to deal with a wrongful act and a violation of statutory duty by the corporation itself. The Crown, to my mind, never had anything to do with St. Stephen's Green. To make the Board of Works servants we must find a master, and the defendants find their master here, by first vesting the Green in themselves, and then bringing in the Crown over their heads. This is inferring or creating a master for the purpose of imputing the character of a servant to the public body to which the statutes gave the powers of a principal.

Wills, J., says :—"I am of opinion that the defendant's counsel have altogether failed to show any facts, or anything in the constitution and history of the Trinity House, or in the legislation effecting it, which entitles the Court to consider it on the same footing as a great officer or a great department of the State." He fortifies himself in this opinion by the fact that the Trinity House had been successfully sued in the *Romney Marsh Case* (1).

We are fortified here by the repeated cases in which the Board of Works has been successfully sued. *Murphy* v. *Soady* (2) is the only one in which they have escaped. In the note of the judgment of the Chief Baron it is stated that the defence there was in substance that the negligence complained of was not the negligence of the Commissioners but of the Park bailiff. The decision was that they were not liable for the negligence of their subordinate officers. That decision is not applicable here, because we have to deal with a wrongful act, and a violation of duty, by the corporate body itself.

I not only respect the *dicta* of the Chief Baron as to the position of the Commissioners in relation to the Phœnix Park, but

(1) L. R. 7 Ex. 247. (2) *Ante*, p. 213.

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having regard to the circumstances of that Royal Park, and to the legislation respecting it, I see no reason to doubt the soundness of his conclusion. The Commissioners were neither owners nor occupiers of the Phœnix Park; they were managers only; that they were managers for the Crown, and not for the public, is the necessary inference from the fact that no member of the public has any right to enter the Park save by permission of the Crown. Here, on the contrary, the right of the public to use St. Stephen's Green was created by Parliament. Parliament, not the Crown, gave it, and Parliament alone can take it away.

The question remains—and I state it in the words of the Chief Baron in *Murphy* v. *Soady* (1)—Within which of two classes do the Commissioners come (with respect, not to Crown lands in a Royal Park, but to St. Stephen's Green, vested in themselves by Parliament); whether are they public officers in the sense that they are servants of the Government—in which case they would be exempt—or are they trustees of an undertaking with duties to the public? In my clear opinion the latter description, and not the former, applies to them in regard to St. Stephen's Green.

I have now to observe upon some of the cases cited. In *Galsworthy's Case* (2) Lord Esher says:—"The result of the cases of *The Mersey Docks Trustees* v. *Gibbs* (3), and *Southampton Bridge* v. *Southampton Board* (4), really is that when Commissioners have to construct works and may levy rates to pay for their construction, there is an implication, unless it be clearly negatived by something in the Act to the contrary, that it is within their power to levy any rate to provide for a liability incurred through the work being done negligently by their servants." Fry, L. J., says money recovered "in respect of negligence is not a sum expended on the works; it is a liability incurred in carrying the Act into execution." This case may become material, if the plaintiff ever comes to levy the amount of a judgment.

The Privy Council decision in the *Sanitary Commissioners of Gibraltar* v. *Orfila* (5) is an instance in which a public body was

(1) *Ante*, p. 213.
(2) [1892] 1 Q. B. 348.
(3) L. R. 1 H. L. 93.
(4) 8 Ell. & Bl. 801.
(5) 15 A. C. 400.

held to be invested with administrative powers, subject to the control of the Government, and with no intention to render it responsible in respect of an injury caused by mere nonfeasance. But, in his judgment, Lord Watson says that the proposition in their favour that they were a public body executing statutory duties without reward, was hardly maintainable as an independent proposition; their own contention was that they were not liable for nonfeasance, but only for misfeasance. That proposition, if put forward by these defendants, would be a confession of liability for the misfeasance for which they are sued. It is important to note that the funds of the Gibraltar Commissioners were described as public moneys in the Treasury. Their ordinary expenses were provided for by a general rate leviable in respect of real property within the garrison and town, the property of the Crown being expressly included. In cases where it was necessary to raise more than the amount of the rate, it came from Government moneys, if approved by one of H. M. Principal Secretaries of State, and in holding them not liable for original defects in the structure, the failure of which caused the injury, their Lordships assumed that they would have been liable in respect of their failure to strengthen the foundations, on its being proved that they were negligently ignorant of those defects.

In *Raleigh* v. *Goschen* (1) the liability of officials as individuals was admitted, and the question was narrowed by Romer, J., to whether the action was brought against them as an official body; he held that the act complained of was an act of the defendants, treated as an official body—that is to say, as a body representing the Crown or Government; the defendants had done nothing themselves, and the decision entirely turned upon the consideration that, as an official body, they were not responsible for the acts of subordinates, being themselves merely servants of the Crown. That case does not help the defendants.

Graham v. *Commissioners of Works* (2) was an action of contract, but the contention of the defendants was they were servants of the Crown, and that the contract was made by them in that capacity. In other words, that the contract was made by the Crown, and,

(1) [1898] 1 Ch. 73. (2) 17 T. L. R. 540; [1901] 2 K. B. 781.

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therefore, that the only remedy was by Petition of Right. The procedure by Petition of Right is available only against the Crown, and, therefore, the contention involved the same question with which we have to deal, to this extent, that in each case the existence of a Crown immunity or Crown privilege is the foundation of the defence. It was held that the Commissioners were liable to be sued by action as subjects of the Crown, and if liable to be sued as subjects in respect of a contract, this goes some way to show that, if their contracts are theirs, and not Crown contracts, their wrongful acts also must be their own, and not acts of the Crown. This case is material also for the observation made by one of the Judges that liability to be sued may exist, even though the property vested in the Commissioners for public purposes may not be liable for execution.

In *Wood's Case* (1), in which the English Commissioners of Works were the defendants, it was contended that they represented the Crown, and were in fact the Crown—the very argument pressed here by Mr. Fitz Gerald. But Lindley, L.J., says no authority has been cited to show that this particular corporation, incorporated for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a Corporation specially incorporated in this way is in the same position as regards costs as the Crown. The corporation will be provided by Parliament with funds for whatever purpose is within the scope of their powers and obligations. They will have to pay the costs out of these funds.

Again, Pollock, B., in *Bray* v. *Lancaster Justices* (2) describes public purposes with regard to exemption from liability as those of such a kind as to fall within the province of Government. In *Hart* v. *Holmes* (3) the functions of the Board of Control, who were represented by my colleague as the defendant, were functions "falling within the province of Government." All these cases to which I have referred give, in my opinion, no countenance to the contention that St. Stephen's Green is a Government department; that the Board of Works as its managers are servants of the Crown. The rating cases depend on different considerations, and in Ireland are chiefly material only as affording an instance in the terms of

(1) 31 Ch. D. 607. (2) 22 Q. B. D. 484. (3) [1898] 2 I. R. 656.

one statutory exemption from rates of the use by Parliament of the words "public purposes" in a wider sense than that of "Crown purposes" or "State purposes." *Reg.* v. *M'Cann* (1) decided only that the occupation of Chelsea Bridge by the Commissioners of Works was in contemplation of law, for rating purposes, an occupation by the Crown, having regard to its being built on Crown land, and paid for by public money. I abstain from the further multiplication of an already exceptionally long list of references. I have in general terms stated why the great majority of these cases to which we have been referred do not apply here, and I have occupied more than sufficient time in explaining the reasons for my conclusion that the contention of the defendants cannot be sustained, that they are not within the exception of the exempt class defined in the *Mersey Docks Case* (2), and that this appeal should be dismissed with costs.

WALKER, L. J. :—

The tort for which the defendants in this case are sued consists in the erection and maintenance by the defendants of a dangerous nuisance on ground under their control, by which the plaintiff, a member of the public lawfully using the ground, was injured.

I think the liability entirely depends on the relation to which this corporation—the defendants—stands towards the public and members of the public under the St. Stephen's Green Act of 1877.

Our law recognises that every ~~corporation or person~~ is responsible for a wrong done by a servant of such corporation or person acting within the scope of his authority, and of course the servant who actually commits the wrong is himself also individually responsible. But this principle is subject to a well-established limitation. The Crown cannot even in a Petition of Right be made liable for a tort committed by its servant, for this would be an invasion of the constitutional principle that no tortious act can be attributed to the Sovereign ; and if the alleged tortious act is committed by the servants of a person or corporation,

(1) L. R. 3 Q. B. 677. (2) L. R. 1 H. L. 93.

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who are acting as officers of State, with authority delegated by the Crown, or are acting for the public in the sense that they are in that capacity servants of the Government, and as such are managing some branch of the Government business, then such persons or corporation are not responsible for the act of their servant who does the wrong. They represent the Crown, and for the protection of the constitutional principle are in the same position as the Crown, as regards immunity for the act of the servant. The King cannot authorize a wrong, as Cockburn, C.J., says in *Feather* v. *The Queen* (1): "For to authorize a wrong is to do the wrong, inasmuch as the wrongful act when done becomes in law the act of him who directed or authorized it," and this leaves untouched the remedy against the servant who actually commits the wrong.

It may well be, however, that there is an exception to the general principle—an exception, however, which I do not think necessary for the decision of this case—that if a corporation is interposed between the Crown and the public for purposes of public service, and from the character of their incorporation and its objects the making of contracts or liability for breach of express duty imposed is contemplated, there should be a remedy in the ordinary Courts of law for breach of contract or for breach of duty.

I think the statutes on which *Graham* v. *Commissioners of Public Works and Buildings* (2) was decided fulfil that position at least as regards contracts made, and there is no doubt there the Post Office when built would be held for the public service.

In this case, for instance, a remedy for breach of express contract made by the Commissioners of Public Works in reference to the railings of the square would, I think, be conferred under *Graham* v. *Commissioners of Public Works and Buildings* (2), and I am inclined to think also a liability to be sued for breach of express duty, though, as Mr. Justice Phillimore says in the case referred to, "the Crown property, if they had any, could not be seized."

Admitting, however, to the fullest extent the general principle,

(1) 6 B. & S. at p. 296. (2) 17 T. L. R. 540; [1901] 2 K. B. 781.

the question is whether the defendants here are—to use the language of Baron Fitzgerald—in the position "of mere agents for the Crown, or are some of those known officers through whom the Crown directly exercises its prerogative, and who themselves are properly responsible to Parliament, and whose agents or servants can only be answerable if at all personally or individually."

It will be observed in the present case that the 6th paragraph of the defence alleges that the defendants did the acts as trustees, servants, or officers of the Crown, averments which are inconsistent with their alleged immunity; but as I think the real question in this case arises, not on the defences, but on the claim, which the defendants are entitled to show, contains no cause of action. I lay no stress on that circumstance.

It is I think now perfectly settled, apart from the exception which I have been considering, that statutory trustees for public purposes upon whom a duty exists towards members of the public are liable in an action for breach of that duty, although they act without profit or reward, and though they have no funds in their hands to meet the damages given against them, or no property be shown to exist, liable to execution upon a judgment: *The Mersey Docks* v. *Gibbs* (1); *Coe* v. *Wise* (2); *Levingston* v. *Guardians of Lurgan Union* (3), which last case is a decision of the Exchequer Chamber and binds us. The 7th and 9th defences rely on the non-existence of funds other than those provided by Parliament, which does not appear to me to afford an answer to the obtaining of a judgment. The subject of funds, however, under the Stephen's Green Act requires special notice when I come to refer to that statute.

In every case the liability of a body created or taken over by statute for the performance of trusts must depend upon a true interpretation of the statute; but it will always be material to consider the character of the subject-matter, the character of the corporation entrusted with the duties, and the nature and source of the funds applicable to discharge the trusts. By statute (54 Geo. 3, c. 208), at the instance of inhabitants and proprietors

(1) L. R. 1 H. L. 93. (2) L. R. 1 Q. B. 711. (3) I. R. 2 C. L. 202.

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of the square certain official persons and named residents were appointed Commissioners, and they were authorized to contract for the making, completing, improving, and ornamenting the square, Stephen's Green; and a permanent fund was created for this purpose, and for the purpose of providing the expenses of carrying the Act into execution. The Act contemplates actions being brought against the Commissioners, and gives rights in respect of such actions usually conferred on public bodies. Under this Act the *cestuis que trustent* of the square were apparently those contributories, proprietors, and occupiers. It was in no sense a Royal Park or held for the general public.

It is next material to consider the character of the body in whom the Park of Stephen's Green was vested. The Commissioners of Public Works were constituted by 1 & 2 Wm. 4, c. 33. Its object was to promote the execution of public works by advances through the aid of public credit on different security under the control of Commissioners to be appointed, and also to transfer to such Commissioners the duties then performed by various public boards, capable of being consolidated with advantage and economy.

To that end, three persons were appointed by the Crown during its pleasure; authority was given to issue a credit to them out of public moneys for salaries and necessary charges and expenses in the execution of the Act; also for the purpose of making advances by way of loan to public bodies of almost all kinds for public works, including drainage of land, for which securities on real and personal estate were to be taken in the name of their Secretary, which securities were to vest in his successor on appointment; and also authority was given to make free grants out of public moneys placed under their control for roads, bridges, harbours, &c. Their accounts were to be laid before Parliament and transmitted to the Treasury, and the Commissioners were to sue and be sued in the name of their Secretary.

There were also transferred to these Commissioners the powers of Directors of Inland Navigation and Commissioners of Irish Fisheries, under certain recited statutes, and they also became

harbour authorities with rights of leasing tolls and duties, and with duties and obligations as regards shipowners frequenting such harbours.

It is obvious I think that the Commissioners of Public Works under that Act were not necessarily mere agents for the Crown; they acquired and held property for public purposes, and could sue and be sued in respect of it.

By an Act of 1860 (23 & 24 Vict. c. 42), the care and management of Phœnix Park, which under an Act of 1851 had been, as a Royal Park, vested in the Commissioners of Works and Public Buildings, was transferred to them, and it was under this Act the case of *Murphy* v. *Soady* (1) came to be decided in a manner which I may respectfully say was on its facts obviously right.

In 1869, by an Act, 32 & 33 Vict. c. 74, which recited that it had been usual that lands in Ireland required for various departments of the public service should be taken by the Commissioners in the name of their Secretary, which had been found inconvenient, it was enacted that for the purposes of the Act of taking, acquiring, and holding any lands in Ireland required for any department of the public service, or for any public purpose, the Commissioners were constituted a corporation, and on the passing of that Act, all lands in Ireland vested in the present or any former Secretary, his heirs, executors, &c., and held by him or them in trust for any such public department, or any public trust, or for the use and benefit of the Crown, became vested in the Commissioners as such corporation, on like uses and trusts. It was in that capacity that the Commissioners came to be named as trustees by the St. Stephen's Green Act, 1877—one all important in the present case. This Act recites at length the 54 Geo. 3, c. 208, and that a fee-farm grant had been made under it at a rent of £300, and that there was an existing debenture debt of £2000, and then recites as follows:—"And whereas there is within the municipal boundaries of the City of Dublin no public park, and it would be of great public advantage and conduce to the health and enjoyment of the inhabitants of the city if the said square were opened for their

(1) *Ante*, p. 213.

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recreation and enjoyment, and were for that purpose discharged from all estates, claims, rights, and incumbrances affecting it, and were vested in and maintained and managed by the Commissioners of Public Works in Ireland." It then recites an agreement by which Sir Arthur Guinness was to pay the debenture debt, and effect improvements suitable to make the place a public park, and the Corporation of Dublin were to release the rent, and thenceforward gratuitously supply water and gas as considered in the opinion of the Commissioners necessary for a public park.

The works which Sir A. Guinness was to construct were to be agreed on between him and the Commissioners, subject to the approval of the Lord Lieutenant, and when the Commissioners were satisfied, and notice was given by them to the Lord Lieutenant, he was, by order to be published in the *Dublin Gazette*, to declare the square to be open for a public park, and thereupon the square was to be vested for the purposes of the Act in the Commissioners of Public Works as incorporated by the 32 & 33 Vict. c. 74, freed from all obligations, debts, and liabilities affecting it. The Commissioners of Public Works were given power to recover from the occupiers arrears of frontage rates, and pending suits by or against the existing Commissioners were to be continued by or against the Commissioners of Public Works.

The most important section, however, is section 15. [His Lordship read the section.] There, by the clearest language, the Commissioners of Public Works are put under an obligation to maintain and keep Stephen's Green in good and sufficient repair, and in a proper and ornamental condition, and allow it to be used and enjoyed as a public park for the recreation and enjoyment of the public, and not for any other purpose, and the public are invited or allowed to give subscriptions to carry the powers of the Act into execution.

Byelaws may be made for preserving good conduct and preventing nuisances and obstructions in the park, or pathways or roads surrounding the same, subject to the approval of the Chief Secretary; and then come the provisions for supplying funds to carry out the Act, and they are, first, moneys, *i.e.* private subscriptions or other lawful receipts of theirs, and the deficiency, and only that, out of such moneys as may be provided by Parliament

for the purposes of the Act, and the accounts of all moneys expended under the Act are made subject to the provisions of the Exchequer and Audit Departments Act, 1866, a necessary provision for the purpose of fixing the amount to be included in the estimates; and, finally, the 22nd section provides that "the Commissioners of Public Works shall not be assessed or rated to any county, borough, or other local rate or cess, in respect of St. Stephen's Green, or any erections thereon, or any part thereof."

This was the Parliamentary contract to which the residents, the existing Commissioners of the square, Sir Arthur Guinness, the Corporation, as representing the citizens, and the Legislature, as representing the public, were parties. The object of a public park might have been equally attained by vesting the square in the city dignitaries mentioned in the Act of 1814, and incorporating them for the purpose; but it was natural and convenient that the Corporation created in 1869 for the purpose of taking, acquiring, and holding any lands required for any department of the public service or for any public purpose should be utilised, and accordingly they are chosen.

The public cannot as such be grantees, and, therefore, there must be some named body to hold in trust for them, *i.e.* for "this public purpose." We have not to deal with an implied obligation, but an express one, and it is attached to what was not Crown property before this Act.

In *Gilbert* v. *Corporation of Trinity House* (1) the Corporation had vested in them all lighthouses and beacons, and they collected all dues payable in respect of such, and handed them over to the Mercantile Marine Fund. The establishments of general lighthouse authorities were fixed by Her Majesty in Council. All expenses and estimates therefor were to be submitted to the Board of Trade and were subject to its approval. The Treasury were authorized to advance sums out of the Consolidated Fund to the Mercantile Marine Account, and its accounts were to be audited by the Commissioners of Audit. It was held they were liable for negligence, through their servants, in respect of a beacon which

(1) 17 Q. B. D. 795.

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they managed, and that they were not in the position of officers of State, and did not represent the Crown; and by s. 470 of the Merchant Shipping Act the property they managed or held was exempted "from all public, parochial, or local taxes, duties, and rates of every kind," as here Stephen's Green is; and this exemption was relied upon in *Gilbert's Case* (1) as showing the property was not Crown property; and if Stephen's Green or any erection on it had been included in our valuation lists, a question of much the same character as we are now considering would have arisen. My Lord Chief Baron considers this too small to notice, but it was considered by the Judges in *Gilbert's Case* (1) an important element. In the Chelsea Bridge case, *Reg.* v. *M'Cann* (2), the bridge was constructed on Crown property by the department which deals with such, and all tolls received were to recoup the public Exchequer, and any surplus was held in trust for the Crown.

I should like to contrast with a case like the present such a one as *The Sanitary Commissioners of Gibraltar* v. *Orfila* (3). There Orfila was the owner of a plot of ground, with a dwelling-house thereon, situate at the base of a rocky cliff and overhung by a road. This road was supported by a retaining wall, which wall was not part of the road. The Commissioners, by an act of nonfeasance, omitted to maintain this wall. There was a slip, and the retaining wall came down, bringing with it the parapet wall and four feet of the outer margin of the road, whereby the dwelling-house was greatly damaged. The road and wall had not been constructed by the Commissioners, and they had existed from a period beyond human memory, and the original construction of the base of the retaining wall was proved to be defective. All public streets and highways were under the control of the Government, and were maintained by a rate payable to the Governor. In 1865 the management of highways was by an order transferred to Commissioners, and this order was followed by one of 1883. The ordinary expenses of the Commissioners' administration were provided for by a general sanitary purposes rate. This rate was subject to the revisal of the Colonial Secretary. The Governor had control over any expenditure for any special

(1) 17 Q. B. D. 795. (2) L. R. 3 Q. B. 677. (3) 15 App. Cas. 400.

work, and raising of capital; and all moneys received by the Commissioners were directed to be paid into an account kept at the public Treasury and kept distinct from other public moneys. The same ordinance of 1883 enacted that, subject to such rules and regulations as might be made by the Governor under the order, the Commissioners should be the surveyors of all the public highways, and should, for the purposes of the order, control, manage, and maintain the public highways, and also all walls, retaining walls, and parapet walls situate thereon, or pertaining thereto, and which were necessary for their support, or for the safety of passengers, or ordinary traffic, and thus their powers and duties were limited to road conservancy.

The Judicial Committee of the Privy Council decided that the Commissioners were not liable for the act of nonfeasance on the ground as stated by Lord Watson—"The Government in so far as regards the maintenance of retaining walls belonging to it remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on. They [the Privy Council] do not think that it was the intention of the Crown in giving the sanitary body administrative powers, subject to the control of the Governor, to impose upon it any liability which did not exist before in respect of original defects in the structure of the retaining wall."

There the Commissioners were merely managing what had been and remained Government property.

Campbell v. *Hornsby* (1) is another case which requires careful consideration. It was an action against the Commissioners of Public Works in their capacity of Commissioners of the Harbour of Kingstown sued by their Secretary, and the action was for injuries to the plaintiff's vessel, caused by rocks lying in the harbour. Under the statutes 55 Geo. 3, c. 191, 56 Geo. 3, c. 62, and 1 Geo. 4, c. 69, Commissioners were appointed by the Lord Lieutenant, removable at his pleasure, for the purpose of making and completing and improving the harbour. This was to be done out of advances from the Consolidated Fund, in all £160,000. The plans were to be approved by the Lord Lieutenant. He appointed

(1) I. R. 6 C. L. 37.

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the Harbour Master, and it was directed that when the harbour was completed it should be transferred to the Corporation for preserving and improving the Port of Dublin. This last provision was altered by the 6 & 7 Wm. 4, c. 117, which decided that it should remain permanently in the Commissioners, and they were given much the same powers over the harbour as the Corporation for preserving and improving the Port of Dublin; and they got powers to impose rates and dues on vessels and supply ballast: and shore dues, and all other moneys received by the Commissioners (except a share of penalties) were made applicable to maintaining and regulating the harbour, and any overplus was directed to be paid into Her Majesty's Exchequer towards making good the public advances. The defence averred that the shores and rocks which did the injury to the plaintiff's vessel were existing and below low-water mark before the defendants became Commissioners, and that they had no funds applicable to their removal, such funds being exhausted by the maintaining the existing works. There was a demurrer to this defence. Baron Deasy held that the defence was good on the authority of *Metcalfe* v. *Hetherington* (1), and he distinguished *Coe* v. *Wise* (2) on the ground that there was in that case an express duty created by the Act to make and maintain the sluice. Baron Fitzgerald took higher ground. He states (at p. 51 of the Report) the *prima facie* liability of statutable Commissioners and the exception:— "Their liability is to be determined upon a true interpretation of the statutes under which they are appointed; and if the true interpretation of those statutes is that a duty is cast upon them not only to make the harbour, but also to take proper care and use reasonable skill that the harbour is such as the statutes authorized, or to take reasonable care that it is in a fit state for the use of the public who use it, then those injured by their neglect to fulfil the duty thus cast upon them may maintain actions against them, and be indemnified out of the funds vested in them by the statutes; and, further, the proper rule of construction of such statutes is that, in the absence of any intention to the contrary, the Legislature intends that the body shall have the same duties, and that

(1) 11 Exch. 257. (2) L. R. 1 Q. B. 711.

its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing." And then he proceeds to deal with what he calls a class of cases exempt from this rule (p. 51) :—"Without attempting any general definition or description of this exempt class, I may, I think, venture to infer from what has been laid down that within this exempt class the present case would come if from a consideration of the statutes here the Commissioners are as such, and as respects the duty alleged, in the position of mere agents of the Crown, or one of those known officers by whom the Crown directly exercises its prerogative, and who themselves are properly responsible for such exercise in Parliament, and whose agents can only be answerable if at all personally or individually." And then (at p. 63 of the Report) he draws his conclusion—"Whatever the Commissioners may have become as to the business of maintaining and regulating the harbour, it seems to me that as to its completion and improvement they still remained mere agents of the Lord Lieutenant. Assuming, then, the obstructions in the harbour from which injury in this case arose are as alleged in the plea obstructions existing as a part of what constitutes the original formation of the harbour, it does not seem to me that within the authorities relied on the defendants can be made liable. In their *quasi* corporate capacity they are as to the formation of the harbour mere agents of the Lord Lieutenant, exercising with the aid of the Legislature a part of the Royal prerogative, and without funds under their control." Chief Baron Pigot dissented.

When the case came on for trial, the jury found that the defence relied on was not true, which involved, with the other findings, a verdict for the plaintiff; but the case was then argued on a motion in arrest of judgment, the question being whether the second count disclosed a good cause of action. That alleged that the defendants, well knowing that the harbour was, by reason of great accumulations of stones and mud, in an unfit state to be used by vessels, did not take due care to put it in a fit state for that purpose, but neglected their duty, and permitted the harbour, while they well knew it was navigated, to be in an unfit state to be navigated for want of reasonable maintaining. Baron Deasy delivered the judgment of himself

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and the Chief Baron:—"Now, if it had vested in the Corporation for preserving and improving the Port of Dublin, according to the decision in the case of *The Mersey Docks Trustees* v. *Gibbs* (1), they would have been liable to an action such as this. In the same manner, if it had remained vested in the Commissioners originally appointed, they would be equally liable. They were not officers of the Crown, nor had they control or disposal of any of the revenues of the Crown. They had property, part of which had been the property of the Crown, transferred to them by statute, and part of which was acquired by them under statutory powers given to them for a public purpose, viz. the making and completing the harbour of Kingstown, and they were entitled by statute to levy certain tolls and dues on vessels using the harbour. I am unable to see in what respect their position differed from that of the Trustees of the Mersey Docks. If they were liable to such an action, I see nothing to exempt the present defendants from similar responsibility. When the harbour was transferred to them, they succeeded to all the rights and to all the liabilities of their predecessors. It is true that as Commissioners of Public Works they are officers of the Crown, but they fill, in addition to that, a totally distinct corporate capacity as Commissioners of Kingstown Harbour, entitled to receive the same dues, and bound to apply them to the same purposes as their predecessors, and I see nothing to exempt them in that latter character from liability for a breach of that obligation."

Baron Fitzgerald applied the grounds of his former judgment to the liability for maintaining and regulating the harbour: "Without repeating the matters stated by me, possibly at too much length, in my former judgment, I can now only add that this change of intention in the Legislature I cannot but regard as a determination that the regulation and maintenance of the harbour should be in the hands of a body of the nature, kind, and description, which I have endeavoured to show the Commissioners were, under the previous statutes—agents of the Lord Lieutenant in executing a prerogative of the Crown, with

(1) L. R. 1 H. L. 93.

the aid of Parliament, and, therefore, not liable to be sued in their *quasi* corporate capacity."

This decision was affirmed by the Exchequer Chamber, reported in same vol., p. 540.

The case appears to me a complete authority that the Commissioners were not in relation to this harbour in the position of servants of the Crown.

I think, having regard to the subject-matter, the character of the Commissioners, and the provisions of the statutes, there were stronger grounds in that case than exist here for bringing the defendants in *Campbell* v. *Hornsby* (1) within the exempt class, of which Baron Fitzgerald speaks, and the exceptions to the general rule referred to by Blackburn, J., in *The Mersey Docks Trustees* v. *Gibbs* (2).

As regards the funds question, I admit that the source from which those are derived is an argument to be considered on the question whether the defendants are agents of the Crown, but it is not by any means conclusive. I think the Stephen's Green Act contemplates the defendants having funds from other sources than Parliament, and I cannot assume that they will not get, even from Parliament, funds to meet a liability incurred in the execution of the Act, if such liability legally exists, and at all events I think the plaintiff is entitled to judgment, which is all we now need decide, leaving the plaintiff to work out that point as he may be advised.

HOLMES, L. J. :—

This case comes before the Court in a way with which we were once more familiar than we are now. Before demurrers were abolished, it was usual to have questions of law decided not upon facts that had been proved or legally ascertained, but as they were stated in the pleadings of the respective parties. Occasionally this was found to be a convenient and inexpensive method of deciding the substantial matter in controversy, but for the most part it was only a prelude to the real trial of the action, the

(1) I. R. 6 C. L. 37. (2) L. R. 1 H. L. 93.

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ultimate determination of which was but little affected by the preliminary skirmish.

In the present instance a mode of procedure similar to that of the old demurrers has been adopted by consent, and although it is at least doubtful whether this will lead in the end to the lessening of expense, or to a speedier termination of the litigation, it cannot be denied that it affords a neat and simple means of having a decision upon a question of law, the importance of which to the defendants is not limited to the result of this action.

The following matters must be taken as admitted for the purpose of this appeal:—

(1.) That the square and grounds of St. Stephen's Green, Dublin, are vested in the defendants as a body corporate.

(2.) That the defendants as such body corporate are under a statutory duty to maintain the Green as an ornamental park or pleasure ground for the recreation or enjoyment of the public.

(3.) That after the square and grounds had been so vested, the defendants, acting as such body corporate in the performance of the aforesaid statutory duty, erected and maintained on the Green certain iron structures with sharp spikes, projecting therefrom in such a manner as to be dangerous to members of the public using the Green in exercise of their statutory right.

(4.) That the plaintiff while so using the Green, and without any negligence on his part, had an eye pierced by one of these spikes; and

(5.) That the sole, direct, and immediate cause of this injury was the dangerous character of the structures erected and maintained by the defendants.

It is possible that some of these propositions will not be sustained if the action goes to trial; but accepting them, as I am bound to do for the purpose of this argument, I hold that they show a good *prima facie* cause of action. The general rule of law is that an action for a wrong lies against a corporation when the thing done is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. It is, therefore, for the defendants to show something that

takes them out of this general rule, and the matters relied on with this object are :—

(1.) That St. Stephen's Green is vested in them as trustees for, or servants of, the Crown, and that they did the acts complained of as such trustees or servants.

(2.) That the expenses incurred by them in performing their statutory duties in relation to the Green are defrayed solely out of moneys provided by Parliament, and

(3.) That they have no property or moneys out of which the plaintiff could be paid damages.

The first of these propositions assumes that a corporation cannot be sued for an actionable wrong committed by it while acting as the trustee or agent of the Crown. There is considerable authority to show that this is the law. It was accepted as such by Madden, J., delivering the judgment of the Divisional Court; and although it is likely that this subject may receive hereafter further judicial consideration, I am not disposed to challenge or throw doubt upon it. My reason for agreeing with the judgment appealed from is that the defendants in their dealings with St. Stephen's Green are neither trustees, agents, nor otherwise representatives of the Crown. No doubt the individuals who compose the defendant corporation are nominated and may be removed by the Lord Lieutenant, but their corporate character is given by statute, and their duties as a corporation are prescribed by the same authority. The incorporation of the defendants, in so far as the present action is concerned, was effected by the Act 32 & 33 Vict. c. 74. The 2nd section of that statute provides that for the purposes of this Act, and of taking, acquiring, and holding any lands in Ireland required for any department of the public service, or for any public purpose, the Commissioners of Public Works in Ireland for the time being are hereby constituted a corporation with perpetual succession and a common seal, and with power to hold lands of any tenure.

This section describes under two heads the lands to which it refers:—(1) lands required for any department of the public service; and (2) lands required for any public purpose. This distinction is not merely nominal. It has been recognised and acted on in interpreting legislation of another kind.

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It is now well settled that the Irish law as to the exemption of property from poor rates differs from that of England. In the *Commissioner of Valuation* v. *The Sligo Harbour Commissioners* (1) this Court pointed out the ground of this difference. In England the principle of exemption is that the Crown is not mentioned in, and therefore not affected by, the rating statutes. Accordingly the exemption is confined to lands occupied either actually or constructively by the Sovereign, which would, of course, include lands required for any department of the public service —in other words, for the service of the State. In Ireland, on the other hand, lands dedicated to or used for public purposes and hereditaments of a public nature are exempted by statute, with the result that property like that vested in the Sligo Harbour Commissioners, or in the Derry Bridge Commissioners, although neither used nor required for any department of the public service, is not rateable.

It is reasonable to look for a distinction in the functions and duties imposed by different enactments upon the incorporated Board of Works, correlative to the distinction in the purposes for which the Board is authorized to hold lands. Its position in relation to St. Stephen's Green is regulated by the St. Stephen's Green (Dublin) Act, 1877.

The recitals therein show the previous history of the Green. It appears therefrom that Commissioners appointed under an Act passed in 1814, and in pursuance of the powers thereby conferred, obtained from the Corporation of the Borough of Dublin a grant in fee-farm of the Green at the yearly rent of £300 late Irish currency, and that by means of moneys which the Commissioners were authorized to raise by an assessment from time to time on the surrounding houses and tenements, the Green was enclosed, improved, and afterwards maintained. The Green, in the hands of these Commissioners, was in the nature of private property, kept up for the benefit of the neighbouring householders; nor had the general inhabitants of the city any right of access to it. The object of the Act of 1877 was to carry out a project of opening the Green for the recreation and enjoyment of the citizens of

(1) [1899] 2 I. R. 214.

Dublin, a project first conceived by Sir Arthur Guinness, now Lord Ardilaun, and rendered possible by his generosity. Its leading features were:—(1) The payment by him of the incumbrances on the Green, and of the debt due by the old Commissioners. (2) The conversion at his expense of the Green into public and ornamental pleasure grounds, with lamps and fountains, gas pipes, and water pipes. (3) The transfer by the Dublin Corporation and the Commissioners of all their estate and interest in the Green thus transferred to the Board of Works as incorporated by the Statute of 1869. (4) An undertaking by the Dublin Corporation to give, free of cost, such supplies of water and gas as may be required for the Green; and (5) Its subsequent maintenance by the Board of Works as a park and pleasure ground for the public. Provisions for effecting the foregoing objects are contained in sections 2–15 of the Act, and it was in pursuance thereof that the defendants became the owners of the Green.

Now if I am right in the distinction I have drawn between lands required for a department of the public service and lands required for any public purpose, it is, I think, clear that St. Stephen's Green was vested in the defendants as land coming within the second category.

I cannot conceive how the provisions of the Act of 1877, to which I have referred, could have had the effect of converting what had been private property into property of the Crown. The parties to the tripartite bargain, Sir Arthur Guinness, at the time Member of Parliament for Dublin, the Municipal Council of the City, and the Commissioners, who were trustees for the neighbouring householders, had no intention of transferring the property to the Crown, nor is the Crown interested in the purposes for which it is to be used.

The duties of the defendants, as prescribed by the 15th section of the Act, are to maintain the Green as an ornamental park, or pleasure ground for the recreation or enjoyment of the public; to erect, if they think right, with the consent of the Treasury, lodges, ornamental buildings, fountains or waterworks, to employ gate or lodge keepers, and other necessary officers and servants for the order and management thereof; to make such alterations and improvements as they may think fit; to keep at all times the Green

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and the erections thereon, and all other things thereto belonging, in good and sufficient repair and in proper and ornamental condition, and to allow the same to be used and enjoyed as a public park for the recreation and enjoyment of the public, and not for any other purpose. It cannot be said that there is anything in the nature of these functions calculated to make the body entrusted with them a trustee for or the servant of the Sovereign; and, if the defendants occupy this position, it must be by reason either of something inherent in their constitution or of some other provisions of the Act of 1877.

There is no doubt that the Board of Works is for many purposes a Government department, and that for all purposes the individuals who compose it are responsible to the Crown. If the Board were negligent or careless in carrying out its duties in relation to St. Stephen's Green, one remedy—I do not say the only remedy—might be the removal by the Lord Lieutenant of the Commissioners from their office, and the appointment of others in their place; but neither the Sovereign himself nor his representative has power to dissolve the corporation or to withdraw from it any of the functions imposed on it by Parliament.

The Legislature, finding in 1877 a corporate body already in existence having statutory authority to hold lands required for any public purpose, selected it as a suitable medium for the performance of certain services for the benefit of the public generally, and the citizens of Dublin in particular, just as it might have selected the Town Council of the city, or created a new and independent corporation for the same purpose.

The Act might have authorized the defendants to obtain funds for putting its provisions in force by an assessment on all rateable hereditaments within the borough, and, if so, it would be impossible to distinguish the present case from *Campbell* v. *Hornsby* (1).

That action was brought against the Commissioners of Public Works as Commissioners of Kingstown Harbour, a position which they held by virtue of a warrant of the Lord Lieutenant and the

(1) I. R. 6 C. L. 37.

provisions of several statutes. They were not incorporated as Commissioners of the harbour, but they were sued in the name of their Secretary, such being the prescribed method of testing their liability in their *quasi* corporate capacity.

It was argued, upon what seems to me to be much stronger grounds than exist in the present case, that in performing the duties imposed on them in relation to the harbour, they were acting as agents or servants of the Lord Lieutenant, and consequently were not liable for the negligent performance of such duties as a *quasi* corporation.

It was, however, held by the Court of Exchequer, and afterwards by the Exchequer Chamber, that the action lay, and a judgment for the plaintiff for £1140 was upheld. The decision was acquiesced in at the time, and has since been acted on. So recently as the year 1897 a judgment for £1870 was obtained for negligence in the management of the harbour against the same defendants, and although unsuccessfully challenged on other grounds, no objection founded on the nature of the position held by the Commissioners was taken: *Burrell* v. *Tuohy* (1).

This Court is not at liberty to overrule *Campbell* v. *Hornsby* (2), and I think it follows from it that the plaintiff is entitled to succeed in this argument, unless it can be distinguished on the ground that the defendants, when acting as Commissioners for the harbour, are empowered to receive from vessels using it certain dues, to be applied by them in paying the expenses of its maintenance. Some matters relied on by Fitzgerald, B., the only dissenting Judge in *Campbell* v. *Hornsby* (2), in support of the view that the Board was the agent of the Crown, are wholly absent from the present case, and the only point of difference in favour of the defendants is the source from which they derive the funds that enable them to carry out their statutory duties. The 15th section, after prescribing the duties of the Board already mentioned, concludes as follows:—"And for effecting any of the objects of this Act it shall be lawful for the Commissioners of Public Works to accept private subscriptions from persons willing to contribute towards carrying into execution

(1) [1898] 2 I. R. 271. (2) I. R. 6 C. L. 37.

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the powers of this Act, or to permit such persons, from time to time, to contribute to the objects of this Act by erections of such statues or otherwise suitable works in the said park" as the Commissioners approve. A previous section—the 7th—had vested absolutely in the defendants all property of whatsoever description belonging to the old Commissioners under the Act of 1814. The 21st section provides that the defendants shall defray such of the expenses incurred in carrying the Act into execution as cannot be defrayed out of moneys received by them under the Act or applicable to the purposes thereof out of such moneys as may be provided by Parliament for such purpose.

Taking these provisions together, they contemplate that the primary fund for carrying the Act into execution was to consist of the moneys (if any) of the old Commissioners and moneys contributed by private subscriptions, and if these sources of revenue proved inadequate, it was expected that Parliament would make good the deficiency.

There was, however, no charge placed on the Consolidated Fund, and there was no guarantee that the expectation of Parliamentary aid would be realized. Now let me assume that the Act had not contained the 21st section, and that public-spirited men, perceiving that if voluntary contributions were not forthcoming a great philanthropic project would fail, had provided under the 15th section an endowment sufficient to carry out its provisions, would not the Commissioners in such case have been in the same position as if they had been empowered to raise the funds by assessment, in other words, in the same position as the defendants in *Campbell* v. *Hornsby* (1)?

If this be so, I am unable to see how their character is altered by a provision that Parliament may from time to time supplement the funds provided by private benevolence. There are many examples in Irish legislation of the granting of aid from Imperial revenues to local or charitable corporations. In the first chapter of almost every Act of the Irish Parliament during the eighteenth century there is to be found a series of gifts of this kind, and

(1) I. R. 6 C. L. 37.

amongst the donees are municipal corporations, the Incorporated Society, the Governors of the Foundling Hospital, the Hibernian Marine Society, the Governors of the Hibernian School, the Westmoreland Lock and other hospitals, as well as many similar institutions. I should be surprised to hear that the effect of this Parliamentary generosity was to make the bodies that benefited by it servants of the King in carrying out their several trusts and duties.

There is probably nothing precisely similar to this in modern legislation, but I think that even at present there are instances of contribution from the National Exchequer to local authorities. Summing up my views on this branch of the case, I find Parliament giving its sanction and authority for providing a park or pleasure ground for the benefit of the public, and as part of the machinery for this purpose vesting certain lands in an existing corporation authorized to hold lands for public purposes, and imposing on such corporation certain duties in connexion therewith. The object was carried out without any assistance from the Crown. The lands were provided by the Municipal Corporation of the city and by private owners. They were laid out and made ornamental by the liberality of a private citizen. The Dublin Corporation undertook a heavy liability for their future maintenance. It was contemplated that the further funds required for this purpose might be contributed by individual generosity, and that any deficiency might be voted by Parliament; but there was no greater legal obligation on Parliament than on the private citizen to find the money.

My proposition—and it seems to me to be neither startling nor far-reaching—is, that in these circumstances, the defendants are in the same position as Harbour Boards, Drainage Boards, Bridge Commissioners, Boards of Poor Law Guardians, that is to say, a body corporate entrusted with duties of a public nature, but not agents of the King. A statutory body whose history and duties present an instructive contrast to the defendants may be found in the case of *Orfila* v. *The Sanitary Commissioners of Gibraltar* (1), and I am greatly assisted in coming to the foregoing conclusion by that contrast.

(1) 15 A. C. 400.

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I have not overlooked some provisions of the Act of 1877 upon which the defendants relied, but to which I attach no significance. The 5th section prescribes that the Green is to be opened as a public park by order of the Lord Lieutenant. It was necessary to appoint some authority to see that the conditions preliminary to the transfer of the property had been fulfilled; and the Lord Lieutenant was naturally selected for this purpose. So, too, where authority is given to make byelaws to be enforced by penalties, it is usual in Irish legislation to require that such byelaws should be approved by the Lord Lieutenant or the Privy Council. The sanction of the Treasury to capital expenditure prescribed in section 15, and the application of the Exchequer and Audit Departments Act, 1866, are necessary consequences of the provisions that Parliament may be asked to provide funds for maintenance.

Having come to this conclusion on the defences that the Commissioners of Public Works acted as agents of the Crown, and that the moneys for maintenance are as a matter of fact provided by Parliament, I have but a few words to say regarding the defence that they have no property or moneys out of which the plaintiff could be paid damages. This question may arise hereafter if the plaintiff obtains judgment, but it cannot in my opinion be relied on as a defence. This is, I think, involved in the decision of *Coe* v. *Wise* (1). There is doubtless many a defendant who could plead with perfect truth that at the time of pleading he has no means of paying damages and whose chance of acquiring such means thereafter would be negatived by a jury; but such a defence would be a novelty. In this case the defendants have vested in them at present a valuable property—the Green itself. It is probable that this property could not be reached by an execution; but it is premature to consider this now. Besides, the private donor contemplated by the Act may turn up at any moment and provide ample means for carrying its provisions into execution for all time to come. There are Irish millionaires who may be stimulated by the example of Mr. Andrew Carnegie into the resolve to spend their millions in their

(1) 7 B. & S. 831; L. R. 1 Q. B. 711.

lifetime; and one of them may turn his attention to St. Stephen's Green, which indeed at present is a noble example of private munificence.

For these reasons I think that the appeal ought to be dismissed.

Solicitor for the plaintiff: *Lett.*

Solicitor for the defendants: *Sir P. Coll.*

G. Y. D.

IN THE GOODS OF LAURENCE MURNAGHAN, DECEASED. M'CONVILLE *v.* WILLIAMS (1).

K. B. Div. Probate. 1903. Feb. 9.

Practice—Costs—Charging order for—39 & 40 *Vict. c.* 44, *s.* 3.

A solicitor was employed by an executor and residuary legatee to obtain probate of a will in solemn form, and at the trial the will was admitted to probate by consent. Proceedings were afterwards taken by next-of-kin not parties to the action, to revoke the probate; but these proceedings were stayed for noncompliance with an order for security of costs. An agreement was subsequently entered into between these next-of-kin and the executor for a settlement, without the knowledge of the solicitor for the executor, and the farms of the deceased, which were the principal assets, were advertised for sale:—

Held, that the solicitor was entitled to a charging order for his costs as between solicitor and client, under 39 & 40 Vict. c. 44, s. 3, on the beneficial interest of his client in the property of the deceased.

MOTION. This was an application on behalf of James Derby, solicitor for Hugh M'Conville, the plaintiff, for an order declaring him entitled to a charge under the provisions of the Legal Practitioners (Ireland) Act, 1876 (39 & 40 Vict. c. 44, section 3), upon four farms in the County of Down, the assets of the deceased, Laurence Murnaghan, and on all other property of the deceased for the taxed costs, charges, and expenses of the said James Derby in the said action, and that the said costs be referred to taxation as between solicitor and client, and that the said several farms and

(1) Before ANDREWS, J.

K. B. Div. 1903. M'Conville v. Williams.

other property of the deceased be sold to raise the amount of such bill of costs and for the costs of the application.

The deceased died on September 29, 1901, having by his will, dated September 25, 1901, after giving some pecuniary legacies, appointed the said Hugh M'Conville his residuary legatee and executor. A caveat was entered by Susanna Williams, a sister of the deceased. James Derby, the applicant, was employed by the said Hugh M'Conville to take proceedings to have the said will proved in solemn form of law, and on February 22, 1902, a writ was accordingly issued in the name of the said Hugh M'Conville against the said Susanna Williams, and the applicant acted as solicitor for the plaintiff in the proceedings to prove the said will. The case came on for trial on June 13, 1902, when a consent was entered into between the parties admitting the will to probate on the terms therein mentioned, and after formal proof of the execution of the said will was given, probate thereof was taken out in the name of the plaintiff. On November 5, 1902, Hugh Murnaghan and James Murnaghan, two brothers of the deceased, who had been resident for over twenty years in America, and not heard of, and had returned to Ireland shortly before that date, issued a writ against the said Hugh M'Conville to revoke the said will, and that they might be at liberty to apply for administration of the estate of the said deceased as in the case of intestacy. On November 24, 1902, the Court ordered that Hugh Murnaghan and James Murnaghan should within three weeks from that date give security for the defendant's (Hugh M'Conville's) costs of that action, but no such security was given. The applicant learned that an agreement had been signed by the said Hugh Murnaghan and James Murnaghan and Hugh M'Conville for a settlement of the action on the terms of M'Conville getting £50, and apparently that Hugh Murnaghan and James Murnaghan were to pay the costs of both actions and any other costs the said Hugh M'Conville was put to in connexion with the estate of the deceased. This agreement was, as the applicant was informed, prepared by the solicitors who acted for the said Hugh Murnaghan and James Murnaghan, but the applicant had received no communication from the said solicitors, and was not consulted by Hugh M'Conville, his client, as to the terms of settlement, and he believed that if it was carried out he

would lose the costs of this action. The property of the deceased consisted of, in addition to household furniture and farming implements, of four farms in the county of Down, held under judicial tenancies. Having seen an advertisement for the sale by auction of these farms on February 10th, 1903, the applicant, on February 3rd, 1903, served the above notice of motion on the said Hugh M'Conville and on the solicitor for the defendant Susanna Williams.

There was no appearance for the said Hugh M'Conville nor for the defendant.

Brunskill, for the applicant:—

The property of the deceased has been "preserved" within the meaning of the Act (39 & 40 Vict. c. 44, s. 3); a charging order can be made under the Act in a probate action: *Heap* v. *Jackson* (1).

ANDREWS, J., made the following order:—

"IT is ordered and declared that James Derby, the solicitor for Hugh M'Conville, the plaintiff in this action, is entitled to, and accordingly that he shall have a charge upon all the said plaintiff's beneficial estate and interest in the property of Laurence Murnaghan, deceased, derived by the said plaintiff under the will of the said deceased, dated the 29th September, 1901, probate of which was applied for and obtained by the plaintiff in this action, for the amount of the taxed costs, charges, and expenses, as between solicitor and client, of the said James Derby, as the solicitor for the said plaintiff in the said action; and it is further ordered that the said costs, charges, and expenses be taxed by the proper officer accordingly."

Solicitors for the applicant: *Stewart & Orr.*

W. L.

(1) W. N., 1886, p. 192.

K. B. Div. 1902.

May 8, 9, 15.

MOORE *v.* MICHAEL DONAGHER AND PATRICK DONAGHER (1).

Loan society—Promissory note—Jurisdiction—County Court—Justice of the Peace—6 & 7 Vict. c. 91—13 & 14 Vict. c. 25.

The treasurer or secretary of a loan society cannot proceed by civil bill to recover the amount of a promissory note made to him under the Charitable Loan Societies (Ireland) Act, 1843, for the repayment of a loan from the society. His sole remedy is by complaint before a Justice or Justices of the Peace under section 30 of the Act.

CASE STATED by the Lord Chief Baron on the hearing of a civil bill appeal.

The appeal was from an order made by the County Court Judge of the County of Donegal at Quarter Sessions, striking out the plaintiff's civil bill for want of jurisdiction as a Court of first instance. The civil bill was brought on the 10th September, 1901, for £9 6*s.* 9*d.* claimed to be due "for principal and interest on foot of a joint and several promissory note dated 17th April, 1897, drawn for the sum of £9 by the defendants Michael Donagher and Patrick Donagher and one Patrick M'Cool, and payable by them on demand to C. Moore, the treasurer for the time being of the Ballyshannon Loan Society, at the times and in the manner prescribed by the rules of the said society, and for said £9 due on foot of said promissory note, and 6*s.* 9*d.* interest thereon due under the rules of said society, and the 6 & 7 Vict. c. 91, and 63 & 64 Vict. c. 25, and for cash lent and advanced by the said society to the defendants and Patrick M'Cool on the 17th April, 1897, and for said sum of £9, being the amount due by defendants to the said society on the 15th May, 1897."

On the hearing of the appeal the following facts were admitted:—That the promissory note was duly signed by the defendants and Patrick M'Cool on the day it bore date; that

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS, GIBSON, and BOYD, JJ.

Patrick M'Cool resided outside the County of Donegal; that the said note was in the form and on the paper supplied by the Loan Fund Board under the Loan Fund Acts; that a petty sessions summons had been duly issued against the defendants on foot of the said note; and that on the hearing at petty sessions the Justices had dismissed the summons without prejudice, requiring production of certain books of accounts of the Loan Fund Society, as the account then furnished to defendants was incorrect, £9 18*s.* being then claimed.

The question submitted by the Lord Chief Baron for the Court was whether the County Court Judge had jurisdiction to hear the said civil bill.

Gaussen (with him *Wylie, K.C.*), for the plaintiff:—

Proceedings lie by civil bill. The words in sect. 30 of 6 & 7 Vict. c. 91, giving jurisdiction to the Justices, are—"it shall and may be lawful." These words cannot be taken as conferring sole jurisdiction on Justices to the exclusion of the ordinary civil remedies.

Horner, and *Drummond, K.C.*, for the defendants:—

Under 4 Geo. 4, c. 32, s. 5, proceedings on these notes might have been taken at quarter sessions or, where the amount did not exceed £10, at petty sessions. That provision was repealed by 6 & 7 Vict. c. 91, s. 1. The latter Act forms a special code dealing with these notes, and it was evidently the intention that the jurisdiction given by section 30 to the Justices should be exclusive. The amending Act of 1900 (63 & 64 Vict. c. 25), sect. 2, sub-sect. 1, provides that the account therein mentioned is to be issued together with "*the summons*," clearly showing that proceedings before Justices were alone contemplated. [They referred to *Timms* v. *Williams* (1); *Albon* v. *Pyke* (2); *Enniskillen Loan Fund Society* v. *Green* (3); *Armstrong* v. *Orr* (4); *Cates* v. *Knight* (5); *Vestry of St. Pancras* v. *Batterbury* (6); Maxwell on Statutes, 2nd ed., p. 156.]

(1) 3 Q. B. 413; 2 Gale & Dav. 621.
(2) 4 M. & G. 421; 9 L. J. (N. S.) C. P. 266; 5 Scott, 241.
(3) [1898] 2 Ir. R. 103.
(4) 31 I. L. T. R. 118.
(5) 3 T. R. 442.
(6) 2 C. B. (N. S.) 477.

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Wylie, K.C., in reply :—

By section 25 of 5 & 7 Vict. c. 91 the note is required to be in the form in the schedule "or to the like effect"; these latter words show that it is not necessary to the validity of a note that it should be in the form and on the paper supplied by the Loan Fund Board; but unless in such form and on such paper no proceedings can be taken on it under the Act, that is, proceedings before Justices under section 30. If the jurisdiction of the Justices were exclusive, the result would follow that a note made on paper other than that supplied by the Loan Fund Board, although it would be valid, would not be enforceable by any means. The words "to be sued for and recovered" in section 27, and "sue for and recover" in section 33, are very wide, and cannot be limited to proceedings before Justices. With respect to the statute of 63 & 64 Vict. c. 25, the 1st section is perfectly general and not limited to proceedings before Justices. Section 2, sub-section 1, by the reference to summons no doubt appears to deal only with proceedings before Justices, but the account directed by that section is only necessary in such cases; in proceedings by civil bill the County Court Judge has power under his jurisdiction to take an account. *Timms* v. *Williams* (1) was decided under the English statute, which contains no provisions similar to those in section 25 of 6 & 7 Vict. c. 91. [He referred to *In re Coltman* (2).]

Cur. adv. vult.

May 15.

LORD O'BRIEN, L. C. J.:—

I may very shortly state my views as to this case, with respect to which I entertained no doubt from the beginning. I think the case is altogether controlled by the 30th section of 6 & 7 Vict. c. 91, and that we need not consider anything outside that section, because I think that the note in the present case was given to the treasurer for the time being, his name being put in simply to identify him. By the statute in question the treasurer was enabled to sue on such note, that is to say, a new right was conferred and a procedure made applicable to its enforcement. In my judgment that procedure is exhaustive and exclusive. I think it is only

(1) 3 Q. B. 413; 2 Gale & Dav. 621.

(2) 19 Ch. D. 64.

requisite to look at the entire of section 30 to see that that is so. A new right is given, new machinery provided for its enforcement, a limited sum only can be awarded as costs, the mode of enforcing the payment of the sum recovered is prescribed, and the proceedings are not to be removed by *certiorari* into the Superior Courts. I should therefore be quite content to rest my judgment on the 30th section; this I believe to have been the view of the learned County Court Judge, and I entirely concur in the view he has taken.

But if we go outside that section I think we find materials strongly confirmatory of the opinion I have expressed. Mr. Horner at an early stage of his excellent argument called our attention to the fact that under the 4 Geo. 4, c. 32, jurisdiction in these cases was given to the Civil Bill Court as well as to the magistrates, and that this statute has been repealed by 6 & 7 Vict. c. 91. That I think is a clear indication that now neither the Civil Bill Court nor the Superior Court has jurisdiction in case of a note made under the provisions of section 30 of the last-mentioned Act. Mr. Horner also referred to another Act of Parliament, 63 & 64 Vict. c. 25, sect. 2 (1) of which provides that "the treasurer of a loan society shall prepare and provide an account setting forth the particulars of the amount sought to be recovered in respect of any note under the principal Act, and that account shall be issued together with the summons for such recovery." I think that the use here of the word "summons," the appropriate term for the document initiating proceedings before magistrates, and the absence of any reference to a writ, statement of claim, or civil bill, is strongly in favour of the view that the tribunal of the magistrates has exclusive jurisdiction.

A case was cited of *Armstrong* v. *Orr* (1), decided by Fitz-Gibbon, L.J., on circuit. A great deal of the judgment in that case I adopt; all the earlier part, dealing with the scope of the Act of Parliament, I think excellent, though there are some words at the conclusion which do not entirely commend themselves to my mind. A cheap and prompt tribunal intended to have exclusive jurisdiction was constituted in the interest of a poor but deserving and industrious class.

(1) 31 I. L. T. R. 118.

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The concluding portion of Lord Denman's judgment in *Timms* v. *Williams* (1) is extremely apposite, and in my opinion well-founded. He said: "The magistrate has full power to do all that is necessary for enforcing payment. The Act therefore has provided a complete remedy. We are not to suppose that the magistrate will refuse to act. The statute certainly falls short of enabling the treasurer for the time being to maintain an action on this note, and an express enactment is necessary to enable him to do so. I have no doubt the intention of this statute was the same as in other Acts which have been referred to in argument, and have been construed by this Court, namely, to afford a cheap and ready domestic forum for settling claims against persons in humble life."

It has been argued that the words "it shall and may be lawful" in the 30th section are merely permissive, and that the jurisdiction of the Courts can be excluded only by express words or necessary implication. This is a formula we are accustomed to, but the question always remains what is the true construction of the language used in any particular section, having regard to any light that may be thrown upon it by other sections of the Act of Parliament and by the scope and object of the Act, taken as a whole. The language of Williams, J., in *Timms* v. *Williams* (2) may be referred to with advantage. He says: "I am of the same opinion; I do not think Mr. Cowling was quite successful in his attempt to distinguish *Crisp* v. *Bunbury* (3), for though the statute which the Court had to construe in that case was more peremptory in some of its terms than the statute now before us, yet the general reasoning of the Chief Justice shows that the object of the Legislature in similar enactments is to prevent expense by providing a prompt remedy. It may be remarked that the 8th section of this statute seems to rise in urgency as it proceeds, for, first of all, it is said 'it shall and may be lawful' for the Justice; then it adds, 'and such Justice is hereby required' to summon the person against whom the complaint is made; then 'such Justice shall proceed to hear,' &c., and in case of non-payment the Justice 'shall by warrant, &c., cause to be levied' the amount of the debt, so that at last the section seems quite imperative." This expresses my view.

(1) 2 Gale & Dav. 621, at p. 628. (2) *Ibid.* at p. 629.
(3) 8 Bing. 394; 1 M. & Scott, 646.

I am then on the whole of opinion that the County Court Judge has no jurisdiction in the case of notes with which the 30th section is conversant. I am prepared to rest my judgment on the 30th section alone, but I think the view which I take of that section becomes more clear when we bear in mind the other considerations to which I referred.

ANDREWS, J.:—

I am of opinion that the question reserved by the Lord Chief Baron in the case stated by him in this civil bill action, viz. whether the County Court Judge had jurisdiction to hear the civil bill, ought to be answered in the negative.

By the civil bill in this action the plaintiff Charles Moore, as treasurer of the Ballyshannon Loan Fund, sued Michael Donagher and Patrick Donagher for £9 6*s.* 9*d.*, as the principal and interest due on a joint and several promissory note for £9, made by them and one Patrick M'Cool, who resided outside the jurisdiction of the County Court, and payable on demand to the plaintiff, the treasurer for the time being of the Ballyshannon Loan Society, and for cash lent by the said society to these persons.

The Act of 6 & 7 Vict. c. 91, by which the laws for the regulation of charitable loan societies in Ireland were consolidated and amended, and which I shall hereafter refer to as the Act of 1843, enacted by the 30th section that all notes and securities for the payment of loans by these societies should be made payable to the treasurer or secretary for the time being of the lending society, and that on failure of payment it should be lawful for such Justice of the Peace as is therein referred to, and he was required, on complaint by the treasurer or secretary, to summon the party complained against to appear before himself or the Justices of the petty sessions therein referred to, who should proceed to hear and determine the complaint, and award such sum to be paid by the person liable as should appear to be due thereon, provided the note or security should be in the form and on the paper prescribed by the Act and not otherwise. Section 18 enacted that all moneys, goods, chattels, effects, and property of the loan society should be vested in their trustees for all purposes of action or suit as well criminal as civil, and section 25 enacted that

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every note or security for the repayment of a loan should be in the form in the schedule, or to the like effect, and that blank forms should be supplied by the Loan Fund Board, and that no proceedings should be had or order made for the recovery of any loan save where the note or security should be on the form and paper supplied by that Board.

These loans, as appears by the Act of 1843, were intended for "the industrious classes," and the expenses connected with them were carefully and strictly limited by the Act. By section 26 the notes were exempted from stamp duty; by section 30 the costs of recovery were limited to 2*s.*; by section 31 the charge for the warrant to levy the sum awarded by the Justice or Justices under section 30 was limited to 6*d.*, and by section 32 the goods seized under the warrant might be sold without employing a licensed auctioneer. A further instance of the prescribed economy will be found in the limitation in section 12 of the barrister's fee for advising on and revising the rules of the society to £1 1*s.*, which, having regard to the duties imposed on him, might not unreasonably be regarded as but scanty remuneration. A limitation of the right to sue for the recovery of the loans to an inexpensive and summary proceeding before a Justice or Justices of the Peace would be quite in harmony with the other limitations as regards expense. One of the Acts repealed by the Act of 1843 was the 4 Geo. 4, c. 32, the 5th section of which provided that notes for payment of loans by charitable loan societies in Ireland might be sued on by civil bill at quarter sessions, or before Justices at petty sessions if the value of the notes sued on at petty sessions did not in any case exceed £10. By section 7 of that Act loans under certain circumstances might be made up to £100; by section 24 of the Act of 1843 loans on personal security to any one individual at any one time are limited to £10, and no power is given by this Act to sue by civil bill. The note is unstamped, and the money lent was the property of the society, and the note is the property of the society. The right of the treasurer to sue on this note and the obligation to pay in a proceeding at his suit are created by the Act, and, in my opinion, do not exist outside the Act. If so, the remedy prescribed by the Act, viz. the proceeding before a Justice or Justices, must be followed, and the remedy of civil bill given by

the repealed Act, but not restored by the Act of 1843, cannot be resorted to. The amending Act of 1900 (63 & 64 Vict. c. 25) appears to me to support this view. Sections 2 (sub-section (1)), 3, and 5, all refer to proceedings before Justices, and no reference is made in this Act to a proceeding by civil bill. By section 2, sub-section (1) the treasurer is required to prepare an account of the particulars of the amount sought to be recovered in respect of any note under the Act of 1843, which account is to be issued together with the *summons* for such recovery. If a civil bill action could be brought one would expect that the same provisions would have been extended to the civil bill. Further, if the remedy by civil bill may be adopted, why may not the remedy by action in the Superior Courts be adopted, which by reason of its expense would appear to be entirely against the policy of the Act of 1843, as would also for the same reason be the remedy by civil bill, though in a less degree.

As regards authorities, the question in this case does not appear to have been expressly decided by any reported case. The case of *Albon and Others* v. *Pyke* (1) was an action by the *trustees* of a loan society in England upon a promissory note which did not appear from the pleadings to have been given in respect of a loan, and the case was decided on demurrer. That case therefore is not in point with the present one. The general rule that the jurisdiction of the Superior Courts is not taken away except by express words or necessary implication was referred to by Tindal, C.J., who said, in giving judgment, that there were no exclusive words in the English Act, 5 & 6 Wm. 4, c, 23 (of which section 8 is similar to section 30 of the Act of 1843), and that it was clear that the jurisdiction of the Superior Courts was not taken away. I do not think it necessary to discuss whether that case was well decided, which may be open to doubt. *Timms* v. *Williams* (2), however, was decided very soon afterwards in the Court of Queen's Bench. It was an action *by the treasurer* of a loan society on a note made payable to the treasurer for the time being of the society for a loan by the society, and was also decided on demurrer. Lord Denman in giving judgment said, "A note given to secure a loan from the society is no doubt a chattel of the society; the

(1) 4 M. & G. 421. (2) 3 Q. B. 413; 2 Gale & Dav. 621.

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property in such chattel does not vest in the treasurer, but is by section 4" [similar to section 18 of the Act of 1843] "deemed to be in the trustees for all purposes of action or suit as well civil as criminal. Then section 8" [similar to section 30 of the Act of 1843] "gives a mode by which the treasurer for the time being may put such note in force when the society wish to recover the sum secured, a magistrate being invested with full power to adjudicate upon the complaint. The remedy by this course is complete, and we are not to suppose that Justices will fail to perform the duty which the law requires of them. As in the case of savings banks, so here, as it appears to me, the Legislature has thought it useful to withhold the power of instituting expensive suits in the Superior Courts, and to appoint a domestic forum to settle those small disputes which a society of this kind is likely to be engaged in." Patteson, J., also considered that the remedy must be sought by the mode of proceeding expressly provided. In 2 G. & D. he is reported as having said, "I think the remedy upon these notes is confined to the summary proceeding before a magistrate." The actual decision in the case was that the proceeding on such a note must be taken by the treasurer in office when the proceeding is commenced. Coleridge, J., said it was enough in that case to determine that the present plaintiff could not sue, but later in his judgment he added, "In the present statute a particular mode of redress is pointed out, the most proper and equitable one for such cases." The judgments of Lord Denman and Patteson, J., in *Timms* v. *Williams* (1) support the opinion I have arrived at in the present case, and *Albon* v. *Pyke* (2) is not an authority against it. The case of *Armstrong and Others* v. *Orr* (3), decided by Fitz-Gibbon, L.J., as Judge of Assize on a civil bill appeal, cannot be regarded as an actual decision on the question we have now to determine, but that learned Judge's observations in his judgment are certainly not unfavourable to the opinion I have expressed in the present case, that the County Court Judge had not jurisdiction to hear the civil bill in this action.

(1) 3 Q. B. 413; 2 Gale & Dav. 621. (2) 4 M. & G. 421.
(3) 31 I. L. T. R. 118.

GIBSON, J.:—

To get at the true construction of the Act of 1843, on which our decision must depend, I shall briefly consider the previous statutes, the Acts of 1843 and 1900, and the cases bearing on the subject.

1. The first Loan Fund Statutes were 4 Geo. 4, c. 32, and 10 Geo. 4, c. 42. Under section 5 of the former Act, notes were to be payable to the treasurer or clerk, and might be sued on by him by civil bill or before Justices, ten days' previous notice at least being given, provided that the value of the notes sued on at petty sessions should not exceed £10. Section 6 limited the amount of loans to £10 within twelve months, and section 9 exempted from stamp duty.

The form of option given and the provision as to the ten days' notice point to the jurisdiction of the Superior Court being excluded: *West* v. *Downman* (1); *Kent's Case* (2).

10 Geo. 4, c. 42, amended the above statute by making the right to sue on notes transmissible to successors in office.

6 & 7 Wm. 4, c. 55, was a new independent enactment governing loan societies. It takes no notice of the previous statutes. It starts on lines of its own, and was the Act in force when the statute of 1843 was passed. Section 2 constituted a Central Loan Fund Board; section 10 vested all property of a loan society under the Act in trustees; section 13 limited loans to £10 due at one time; and section 16 gave the Justices jurisdiction with a 2*s*. limit for costs. The option of proceeding by civil bill was not continued, nor was the £10 limit imposed on Justices' jurisdiction re-enacted. Can the omission of the Civil Bill Court mean that Parliament intended that notes could be sued on in the Superior and Civil Bill Courts as well as before Justices?

1 & 2 Vict. c. 78 repealed both the Acts of Geo. 4, and extended 6 & 7 Wm. 4, c. 55, to all societies already formed or to be formed. Section 19 enabled the treasurer for the time being to sue; and sect. 24 extended the Justices' jurisdiction to the place where the society carried on business or where the defaulters resided.

2. The Act of 1843 replaced the previous enactments, and

(1) 14 Ch. D. 111. (2) 9 A. C. 277, 278—Opinion of Lord Blackburn.

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was a consolidating and amending statute. The *status* and powers of a society under it were considered by me in *Green's Case* (1). The society under this Act is created for a particular charitable purpose subject to express statutory directions; and what the statute does not expressly or impliedly authorize may be taken to be prohibited: *Atty.-Gen.* v. *Great Eastern Railway Co.* (2). Payments made by officers contrary to the provisions of the Act are illegal and punishable by penalty (section 17). Section 18 vests all property in trustees who may sue and be sued in behalf of the society. Section 25 prescribes the form of note, and prohibits proceedings, save where the note is in the form and on the paper supplied by the Board. Mr. Wylie contends that the words "under this Act" occurring in this section limit the prohibition to proceedings under the Act, and that there is nothing to prevent the trustees or treasurer taking a note on ordinary paper and enforcing it in any Court of common law. This is plainly wrong, whether the words "under this Act" relate to "recovery" or "loan" in the clause.

The special form and paper are both prescribed as compulsory for all statutory advances, and the exemption from stamp duty is confined to statutory notes.

How far disregard of statutory provisions may make a transaction illegal or a loan irrecoverable is not now before us, and I do not discuss it (see *Bensley* v. *Bignold* (3); Leake on Contracts, 3rd ed., 645; *Young's Case* (4)). Section 17 may be material on this point when it arises.

Section 30 is the crucial provision on which the case turns. Notes for the payment of statutory loans must be payable to the treasurer or secretary for the time being, who, according to the prescribed form, is a named person; on complaint by such officer the Justice is required to adjudicate, provided the note is in the prescribed form and on the prescribed paper—a condition which is peculiar to the Irish statute, and is rather inconsistent with the existence of jurisdiction in any other Court; costs are restricted to 2*s.*, and *certiorari* is excluded.

(1) [1898] 2 I. R. 103.
(2) 5 A. C. at p. 481—Lord Blackburn's opinion.
(3) 5 B. & Ald. 335.
(4) 8 A. C. 517

This and the following sections disclose an anxious desire on the part of the Legislature to provide a cheap and final tribunal for the enforcement of statutory loans. All these conditions imposed for the protection of borrowers in an Act which had, as its title shows, a charitable object, the treasurer could (if the plaintiff's counsel are right) disregard and avoid by proceeding in the County or Superior Court. This would be a surprising result, as *Timms* v. *Williams* (1) was decided the year before; and section 30, so far from repelling, rather invites the application of Lord Denman's reasoning.

Two points are mainly relied on by plaintiff's counsel The first is based on section 18, which vests all the society's property in trustees with a right to sue. Under this provision it is said the trustees could sue on the note in any Court they liked, and therefore the treasurer, their officer, must have the same power. It is not necessary to decide as to the trustees' rights, as the plaintiff before us is the treasurer. As at present advised, I am not prepared to agree that the trustees could sue on the note. Section 18 was introduced *alio intuitu*, and represents a type of provision frequently met with in analogous statutes. It would be a strange anomaly that simultaneous rights of action on the same statutory note should be vested in the trustees and in the payee in whose name the note must be taken. But whatever the trustees' position may be, the treasurer gets the statutory note with certain statutory conditions attaching to it in his hands. Even if the trustees could seek relief in the Superior Court, it does not follow that he can.

The other point is founded on the words in section 30, "it shall and may be lawful." These words are, however, appropriate, for they give jurisdiction where none existed before. The same idiom is of common occurrence. Thus we find it in 10 Geo. 4, c. 56, sect. 27, where unquestionably the jurisdiction of the Justices is exclusive. The right to sue and the jurisdiction (which when invoked is obligatory) are bound up together. The note is the creation of statute, and was not a note on which the treasurer could sue at common law. Assuming in plaintiff's favour that the payee was certain, and that the words "for the time being"

(1) 3 Q. B. 413; 2 Gale & Dav. 621.

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after the name mean merely the actual treasurer when the note was made (*Cowie* v. *Stirling* (1)), the reference to fines would probably at common law invalidate it: *Ayrey* v. *Fearnsides* (2). In my opinion the unstamped note on the prescribed paper can only be enforced by the statutory payee by summary procedure under sect. 30. The liability and remedy go together.

It may be said that if Justices dismiss a case, it is hard that the society should be without redress. That is for the Legislature, not for us. The same difficulty arises in every case where Justices have exclusive jurisdiction. Hard cases make bad law; but I may observe that in the case stated it does not appear that the Justices acted unreasonably in dismissing the summons.

It was also urged that if the more expensive tribunal was resorted to without necessity, the Court could dismiss the application or refuse costs. Still the defendant would have to appear at the hearing; and the County Court Judge could not (as a Judge of Assize might) dismiss the case. The utmost he could do was to withhold costs under 40 & 41 Vict. c. 56, sect. 56—a very insufficient remedy.

The Act of 1900 aids my construction. Throughout it assumes that the Court must be the Petty Sessions Court. The valuable provision requiring particulars of account to be furnished with the summons would be inapplicable to a civil bill or an action. The costs were raised (sect. 3, sub-sect. 2) to 20*s.* to enable a person to be appointed to take the account. The expression "in any Court" in section 1 cannot enlarge the previous jurisdiction. It comprises all Petty Sessions Courts and all Courts of Quarter Sessions on appeal.

3. I now turn to the authorities. *Cates* v. *Knight* (3) and *Dundalk Railway Co.* v. *Tapster* (4) show that where the context so requires the words "it shall be lawful" may create exclusive jurisdiction. An interesting illustration of the principle is offered by the Public Health Act, 1848, and Local Government Act, 1858, where an option to proceed before Justices, or in the County Court, was held to exclude the jurisdiction of the Superior Court:

(1) 6 E. & B. 333.
(2) 4 M. & W. 168.
(3) 3 T. R. 442.
(4) 1 Q. B. 667.

Tottenham Local Board v. *Rowell* (1); *West* v. *Downman* (2); see also 10 Geo. 4, c. 56, s. 27; 4 & 5 Wm. 4, c. 40, s. 7. *Crisp* v. *Bunbury* (3), *Reeves* v. *White* (4), *Callaghan* v. *Dolwin* (5), emphasize the policy of protecting humble persons from the ruin of expensive litigation. How a statute may affect the recoverable character of a *prima facie* debt is illustrated by *Attorney-General* v. *Fetherstonhaugh* (6) and the *Leamington Case* (7). It can prescribe the cause of complaint, jurisdiction, procedure, and proof.

In *Timms* v. *Williams* (8) (decided on 5 & 6 Wm. 4, c. 23, sect. 8) counsel for the defendant based his demurrer to the action on three points—(1) the treasurer could not sue at common law (see *Cowie* v. *Stirling* (9)); (2) the trustees alone could maintain an action; (3) the Justices alone had jurisdiction. Lord Denman and Williams, J., allowed the demurrer on this last point. Patteson and Coleridge, JJ., held that, though the treasurer might recover on the statutory note before Justices, he could not on common law principles (10) enforce it in a Superior Court. The reasoning of all the Judges is opposed to the present action being maintainable. This case is cited as an authority in reference to statutes creating exclusive jurisdiction in Maxwell on Statutes, 2nd ed., pp. 155, 156, and Byles on Bills, 15th ed., p. 84.

In *Albon* v. *Pyke* (11), decided simultaneously on the same statute, it was held by the Common Pleas that trustees could maintain an action. The case in no view is an authority on our statute, which is much more stringent than the English Act. The Court went on two grounds—one, that the note was not averred to be for a statutory loan; the other, that in any event the trustees could sue. The case is not in point here, where the treasurer alone is plaintiff; but, for the reasons already indicated, I am not satisfied that the second ground is well-founded. The right of property and action vested in the trustees does not overreach the rights and duty of the treasurer, who is payee. The note is not

(1) 1 Ex. D. 514.
(2) 14 Ch. D. 111.
(3) 8 Bing. 394.
(4) 17 Q. B. at p. 1015.
(5) L. R. 4 C. P. at p. 294.
(6) 30 L. R. Ir. 585.
(7) 8 A. C. 517.
(8) 3 Q. B. 413; 6 Jur. 1012; and more fully in 2 Gale & Dav. 621.
(9) 6 E. & B. 333.
(10) *Ibid.*
(11) 4 M. & G. 421; 5 Scott, 241.

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negotiable. How can it be vested in different sets of persons with simultaneous and concurrent rights of action? Why the elaborate machinery for a cheap and expeditious enforcement of the note by the treasurer, if the trustees could, in their discretion, resort to a more expensive procedure? Professional men are human, and will prefer applying to a remunerative rather than to an unproductive jurisdiction. The reduction of costs to 2*s.* in Justices' cases would, if the jurisdiction of other Courts is not excluded, rather tempt the ordinary advocate to resort to a Court where professional services were more adequately recognised.

The present point, noticed in *Green's Case* (1), has only once in Ireland came up for decision, namely, in *Armstrong's Case* (2). It was not actually there decided, but the judgment of Fitz Gibbon, L.J., dismissing the action is a valuable and forcible exposition of the policy of the law.

The fact that the Act of 1900, framed as it was in the interest of the loan societies, and passed at a time when the present difficulty had been pointed out, and was familiar to the minds of all interested, refers throughout to one Court only—that of summary jurisdiction—is no small argument in favour of the view that the Act of 1843 creating a new species of note appropriated for its enforcement an exclusive new kind of remedy. The legislation before 1843 points in the same direction. If the treasurer is not restricted to summary procedure, he can sue in the superior as well as in the County Court.

BOYD, J.:—

Prior to the year 1843 there was express authority given by 4 Geo. 4., c. 32, s. 5, to recover in a Civil Bill Court sums advanced by Loan Fund Boards. There was also a provision in the same section that sums under £10 might be recovered by proceedings before Justices.

By the Loan Fund Act of 1843, s. 1, the Act of 4 Geo. 4 was repealed, and a complete code enacted applicable to the recovery of small loans by Loan Fund Boards, the form of the note and special paper on which it should be drawn was arranged for.

(1) [1898] 2 I. R. 103. (2) 31 I. L. T. R. 118.

There was to be no stamp on the note, and the amount of costs recoverable on legal proceedings taken was limited to 2*s.*, and the mode of execution was also provided for. In my opinion, this new code was intended to supersede the law as it theretofore existed, and to confine the recovery of such loans as came within it to the tribunal mentioned therein, namely, Justices at Petty Sessions.

Solicitor for the plaintiff: *R. H. Reid*
Solicitor for the defendant: *L. R. Lipsett.*

J. G. T.

ATTHILL, APPELLANT; WOODS, RESPONDENT (1).

Loan society—Promissory note—Death of maker—Liability of his executors—Executor de son tort*—Limitation of time—Petty Sessions (Ireland) Act*, 1851 (14 *&* 15 *Vict. c.* 93), *sect.* 10, *sub-sect.* 4—6 *&* 7 *Vict. c.* 91—63 *&* 64 *Vict. c.* 25.

Proceedings by the treasurer or secretary of a loan society to recover the amount of a promissory note made to him under the Charitable Loan Societies (Ireland) Act, 1843, for the repayment of a loan from the society, may be taken against the personal representative (including an executor *de son tort*) of a deceased maker.

Proceedings by the treasurer or secretary of a loan society, on notes made to him for the repayment of loans under the above-mentioned Act are subject to the provisions of sect. 10, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, and must be brought within six months from the time when the cause of complaint arose.

CASE STATED by the Justices of County Fermanagh under 20 & 21 Vict. c. 43.

The following are the material facts as appearing from the case stated:—

By a summons, dated the 23rd June, 1902, issued under the 6 & 7 Vict. c. 91, 14 & 15 Vict. c. 93, and 64 & 63 Vict. c. 25, the respondent, "as representative of Margaret Woods, deceased," was

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

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required to appear at the Petty Sessions at Lack, in the county of Fermanagh, on the 4th July, 1902, to answer the complaint of the appellant (the complainant in the summons), and to show cause why the respondent neglected to pay the appellant the sum of £8 15*s.* 6*d.* alleged to be due to him as receiver of Lack Loan Fund Society, on a note dated the 24th July, 1896, and for fines incurred under the rules of the said society. On the hearing of the complaint (which was adjourned to the 5th September, 1902), the note was produced and proved. It was a joint and several promissory note, dated the 24th July, 1896, made by Margaret Woods as borrower and two other persons as sureties, promising to pay Major Irvine, the treasurer for the time being of the Lack Loan Fund Society, at the times and in the manner prescribed by the rules of the said society, the sum of £7, with all the fines which might be incurred by the makers under the rules of the society. The note was upon paper supplied by the Loan Fund Board. It was further proved that Margaret Woods and both the sureties were dead; that the respondent was a son of Margaret Woods, and had after her death entered into possession of her farm and the chattels thereon, and had received sufficient assets to pay the amount due upon foot of the note; and that the full amount claimed was due on foot of the note. The Justices found as a fact that all the original parties to the note were dead; that the amount claimed was due to the Loan Fund Society on foot of the note; that the respondent on the death of Margaret Woods entered into possession of her assets; ~~and that the said assets~~ were more than equal in value to the amount claimed on foot of the note. They stated that on these facts they were of opinion that the respondent was not legally liable for the amount due on foot of the note, as he was not a party thereto, and as it had not been proved to them that the respondent had taken out letters of administration or probate to Margaret Woods, and they therefore marked the case "dismissed on the merits." On the application of the complainant in the summons, they stated the present case for the opinion of the King's Bench Division, the judgment of the Court being required as to whether, upon the facts found by the Justices, the respondent was liable for the amount due upon foot of the said note, or as to

what should be done in the premises. It appeared from the account indorsed on the summons that since the making of the note nothing had been paid on foot of it for either principal or interest. It further appeared that the note was a renewal of a former note.

Pringle, for the appellant:—

An executor *de son tort* is in the same position as to liability as a duly appointed executor. The executors or administrators of every person are implied in himself: Williams on Executors, 9th ed., p. 1595. If an order cannot be made by the Justices against an executor or administrator, the right to recover on the note is gone, since the jurisdiction of the Justices is exclusive: *Moore* v. *Donagher* (1) The limitation of time prescribed by section 10, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, does not apply. He referred to *R.* (*Maxwell*) v. *The Justices of Fermanagh* (2).

There was no appearance for the respondent.

Cur. adv. vult.

Nov. 26.

LORD O'BRIEN, L. C. J.:—

Two points arise for decision in this case. It appears that Margaret Woods, on the 24th July, 1896, passed a promissory note to the secretary of the Loan Fund Society for a sum of £8 15*s.* 6*d.* She died without having paid the amount, and the defendant here is sued as her executor *de son tort*. The Justices held that proceedings did not lie against the defendant in Petty Sessions. That decision, if right, would involve very grave consequences. The jurisdiction of the Justices in these cases is exclusive, as has been decided by this Court in *Moore* v. *Donagher* (1); and if the magistrates' view were correct there would be no remedy for the recovery of the money lent, after the death of the maker of the note and the sureties. We cannot adopt the view taken by the Justices. We are of opinion that the executors or administrators of a deceased maker of a note, though not expressly named in the Act of Parliament (6 & 7 Vict. c. 91),

(1) *Ante*, p. 290. (2) 35 I. L. T. R. 146.

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may be sued. An executor or administrator is identified in the eye of the law with the deceased testator or intestate, as the case may be; the personality, so to speak, is continuous. In the passage from Williams on Executors (9th ed., p. 1595), cited by Mr. Pringle, it is stated :—"The executors or administrators so completely represent their testator or intestate, in respect of the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them although they are not named in the terms of it; for the executors or administrators of every person are implied in himself." A duly appointed executor can be sued, so also can an executor *de son tort*, who has all the liabilities, with none of the privileges, of a rightful executor. We are of opinion that the Justices were wrong in dismissing the summons on this ground.

There, is, however, another point, viz:—Does the limitation imposed by sect. 10 (4) of the Petty Sessions Act (14 & 15 Vict. c. 93), that the complaint must be made within six months from the time when the cause of complaint arose, apply to proceedings under the Loan Fund Acts. We are of opinion that the limitation does apply, and that, as the proceedings here were not brought within the six months, the summons ought to have been dismissed on this ground. The recent statute (63 & 64 Vict. c. 25) does not help the plaintiff; the procedure is under the Petty Sessions Act, and the proceedings for the recovery of the loan must be brought within the limitation of time thereby prescribed.

GIBSON, J. :—

Atthill, as receiver of the Lack Loan Fund Society, brought a summons, dated 23rd June, 1902, against the defendant, "as representative of Margaret Woods," to recover £8 15*s.* 6*d.*, due on a note dated 24th July, 1896, together with interest and fines. The account was on the back of the summons, and it would appear that the note was a renewal. Interest was calculated for 5$\frac{1}{4}$ years. It was proved before the Justices that the defendant, on the death of the said Margaret Woods, had possessed himself of her assets, which were more than sufficient to pay the said debt, but the magistrates dismissed the case on the merits, on the ground that defendant had not taken out administration. The case has

been stated on that point alone, but two other questions are disclosed which it is necessary to decide.

Assuming that "representative" in the summons is the same as "executor," which term certainly includes an executor *de son tort*: *Westmeath* v. *Coyne* (1),—(1) Does the Loan Fund Act enable a representative to be sued at all? (2) Is the remedy barred by the Petty Sessions Act, sect. 10, sub-sect. 4?

1. It has been recently decided by this Court, in a considered judgment in a case stated from the Assizes (2), that the remedy given by the Loan Fund Act (6 & 7 Vict. c. 91), sect. 30, is in case of a regular note exclusive, and it would appear unintelligible that the right to enforce the debt was determined by the death of the maker. The difficulty is caused by the fact that the section expressly directs that execution is to be levied on the goods of the party liable to pay, whereas an execution against an executor ought to be *de bonis testatoris*. Whether this prescribed form of execution ought not to be deemed directory, and a modified form might not be adopted where an executor was sued, may be matter of some doubt. It may be inconvenient that Justices should have to deal with the difficult questions arising on a defence of *plene administravit*. But here the assets and the position of the defendant are established, and whatever may be the form of execution, I think the defendant can be sued as executor, and that the remedy given by section 30 cannot be confined to the lifetime of the maker of the note.

2. Is the remedy barred by the Petty Sessions Act, sect. 10, sub-section 4? It is suggested that: (1) the statute does not apply to a Loan Fund note; (2) the Act of 1900 excludes the operation of the Petty Sessions Act.

The corresponding limitation in the English Act has been held of general application: *Morant* v. *Taylor* (3); *Tottenham Local Board* v. *Rowell* (4); *West* v. *Downman* (5), and other cases in Stone's Justice of the Peace; and it extends to a demand analogous to that in this case: *Harpin* v. *Sykes* (6). The six months' limitation there was held to run from the time when the cause of

(1) [1896] 2 I. R. at p. 441.
(2) *Moore* v. *Donagher*, *ante*, p. 290.
(3) 1 Ex. D. 188.
(4) 1 Ex. D. 514.
(5) 14 Ch. D. 111.
(6) 1 T. L. R. 307; 49 J. P. 148.

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complaint arose. In the case of a note payable on demand, the cause of complaint would arise on the making of the note: *Re George* (1); *Birks* v. *Trippet* (2); but in the case of Loan Fund notes the cause of complaint, from the frame of the note, would arise only when, according to its terms, it ought to have been paid. In the present case, according to the rules of the society, the note should have been paid off within six months from the making. I think, therefore, that (apart from the statute of 1900) the note was not enforceable.

In *Harpin* v. *Sykes* (3) the cause of complaint arose on a demand in writing. There is no such provision in the Act of 1843, and I do not think that a demand is necessary to constitute a term for the limitation to begin. In that view even six years would not run till such demand was made. I have no doubt that several demands were made in this case.

2. What was the effect of the statute of 1900? In the case of notes current or unpaid on the 1st of March, 1899, it removed certain specific objections to their validity and kept them alive. There have been two decisions, both reported in the *Irish Law Times*, on the statute; one, that a note current or unpaid on the 1st of March, 1899, could be enforced (notwithstanding the lapse of time) within six months after the passing of the Act, as any other view would deprive the Act of all operation (4); the other, that the statute cured only the enumerated defects, and did not exclude the application of the general period of limitation (5).

In my opinion if a regular and valid note, before or after the statute of 1900, cannot, by reason of the Petty Sessions Act, be enforced after six months from the time of the cause of complaint accruing, irregular notes endowed by the Act of 1900, with legislative validity as from July 30th, 1900, cannot stand in a better position, and the Act does not exclude, in the case of such notes, the borrower from the general protection of the Petty Sessions Act. The cause of complaint here arose on July 30th, 1900, and the revived note then came within the Petty Sessions Act. The statute of 1900 cannot be construed as altogether

(1) 44 Ch. D. 627.
(2) 1 Wms. Saund. 33.
(3) 1 T. L. R. 307; 49 J. P. 148.
(4) *Rex* (*Maxwell*) v. *Justices of Co. Fermanagh*, 35 I. L. T. R. 146. [188.
(5) *Fiddes* v. *Mohan*, 36 I. L. T. R.

excluding the Petty Sessions Act in the case of irregular notes, if that Act applies to regular notes. As they could not be enforced before July 30th, 1900, it gives them validity as from that day, but otherwise they are subject to the same defences as apply to valid notes.

MADDEN and BOYD, JJ., concurred.

Solicitors for the appellant: *Falls & Pringle.*

J. G. T.

M'GOWAN & INGRAM (LTD.) *v.* ALEXANDER HAMILTON, WILLIAM M'LEAN, JOHN STEVENSON, AND WILLIAM AGNEW, TRADING AS ROLSTON & CO. (1).

(1900. No. 7753.)

Cost—Taxation—Same solicitor appearing for two defendants—Judgment for one defendant, with costs—Disagreement of the jury as to the other defendant.

Where, in an action of contract, two defendants appear, and defend by one solicitor, and judgment with costs is entered for one of such defendants, the jury disagreeing as to the other, the successful defendant is only entitled to an aliquot portion of the general costs of the defence, notwithstanding that the action is undetermined as to the remaining defendant.

MOTION on behalf of the plaintiffs to review the Taxing Master's taxation of costs. The action was brought to recover the sum of £61 1*s.* 9*d.*, the price of goods sold and delivered. Two of the defendants, Hamilton and M'Lean, appeared and defended by one solicitor, the defendants Stevenson and Agnew also appearing and defending jointly by another solicitor. On the first trial of the action the jury disagreed as to all the defendants. On the second trial, before the Lord Chief Baron, the jury disagreed as to all the defendants, save Agnew, in whose favour the learned Judge directed a verdict, and judgment with costs was entered for him on the 6th November, 1901. This

(1) Before JOHNSON and MADDEN, JJ.

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judgment was by an order of the King's Bench Division, dated 27th February, 1902, set aside, and a new trial directed; but the Court of Appeal, by an order dated 4th July, 1902, discharged the order of the King's Bench Division, and directed that "the verdict and findings of the jury at the trial of this action and the judgment entered thereon by the Lord Chief Baron in favour of the defendant William J. Agnew, be, and the same are hereby restored, and that the plaintiffs do pay to the said defendant the costs of the said action and of the motion in the King's Bench Division to set aside the said verdict, together with the costs of this appeal when taxed by the Taxing Master."

The Taxing Master on taxation allowed the defendant Agnew the whole of the general costs of the action, and counsel for the plaintiffs now applied for an order that the costs of the defendant Agnew should be referred back to the Taxing Master to reconsider and review, with such directions as to the principle of taxation applicable to the case as the Court should deem right.

Gordon, K.C., and *Hanna*, for the plaintiffs:—

We submit that the defendant Agnew is only entitled to an aliquot portion of the general costs of the action. The order of the Court of Appeal only gives him such costs as he is by law entitled to recover, *i.e.* one half and not the whole of the general costs of the joint defence. [They referred to the following cases:—*In re Colquhoun* (1); *Gambrell* v. *Falmouth* (2); *Griffiths* v. *Jones* (3); *Griffiths* v. *Kynaston* (4); *Brown* v. *Gellatly* (5); *Watson* v. *Row* (6); *Smith* v. *Dale* (7); *In re Allen* (8); *Mortgage Insurance Corporation, Ltd.*, v. *Canadian Agricultural, Coal and Colonization Company, Ltd.* (9); *Cain* v. *Adams* (10).]

Serjeant Dodd and *M'Ilroy*, for the defendant Agnew:—

Under sect. 53 of the Judicature (Ireland) Act, 1877, costs follow the event, and the action being undetermined in respect of

(1) 23 L. J. (N. S.) Ch. 515.
(2) 5 A. & E. 403.
(3) 5 L. J. (N. S.) Ex. 267.
(4) 2 Tyr. 757.
(5) 15 W. R. 887.
(6) L. R. 18 Eq. 680.
(7) 18 Ch. D. 516.
(8) 11 Ch. D. 244.
(9) [1901] 2 Ch. 377.
(10) 5 L. J. (N. S.) K. B. 252.

the defendant Stevenson, Agnew is entitled to a complete indemnity, and should be allowed the entire of the general costs of the action. No injury will result to the plaintiffs, as if Stevenson be ultimately successful, the costs paid by Agnew to the joint solicitor will be allowed for in the subsequent taxation of Stevenson's costs. On the other hand, if the ultimate result of the action be adverse to Stevenson, and the solicitor be unable to recover his costs from the latter, Agnew will be liable for the whole on the joint retainer. The order of the Court of Appeal must be construed as it stands: *Kelly's Directories, Ltd.*, v. *Gavin & Lloyds* (1); *M'Cormack* v. *Ross, Beatty, & Norman* (2).

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M'GOWAN v. HAMILTON.

Cur. adv. vult.

JOHNSON, J. :—

Feb. 2.

The question of costs now to be decided arose out of an action of contract brought by the plaintiffs against four defendants—Hamilton, M'Clean, Stevenson, and Agnew, alleging that the defendants traded in partnership under the firm of Rolston & Company. The defendants Hamilton and M'Clean appeared and defended jointly by a separate solicitor: the defendants Stevenson and Agnew appeared and defended jointly by a separate and different solicitor, and the plaintiffs joined issue on these respective defences. The first trial was abortive, the jury having disagreed as to each of the defendants. On the second trial the Lord Chief Baron directed a verdict and judgment with costs for the defendant Agnew, and the jury disagreed as to each of the three remaining defendants. In this condition of the proceedings the action is still pending as to all the defendants except Agnew. On the plaintiffs' motion this Court set aside the verdict and judgment for Agnew, and ordered a new trial. The Court of Appeal discharged the order of this Court, restored the judgment of the Lord Chief Baron in favour of Agnew, and ordered that "the plaintiffs do pay to the said defendant (Agnew) the costs of the said action" and of the motion in the King's Bench Division to set aside the said verdict, together with the costs of the appeal when taxed by the Taxing Master. The defendant Agnew accordingly served his bill of costs on the

(1) [1901] 2 Ch. 763. (2) [1894] 2 I. R. 545.

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plaintiffs, and on its taxation his right to the taxed costs of the motion in the King's Bench Division and of the appeal was not disputed. But the Taxing Master taxed in favour of the defendant Agnew the whole of the general costs of the action. This the plaintiffs objected to on the taxation, and contended, as they contend on the present motion to review the taxation, that the Taxing Master proceeded on a wrong principle, and should have allowed to the defendant Agnew only half, not the whole, of the general costs of the action. In my opinion the plaintiffs' contention is right.

Abundant authority has been cited at the Bar, that before the 3 & 4 Wm. 4, c. 42, sect. 32 (Eng.), 1883 (similar to the 3 & 4 Vict. c. 105, sect. 57 (Ir.), 1840), at all events in actions of tort, where two defendants defended generally, and one of the joint defendants succeeded in his defence with costs, although the plaintiff succeeded with costs against the other joint defendant, the successful defendant (in the absence of special circumstances which do not appear in the present case) was entitled to an aliquot part (one half) of the general costs of the joint defence, in addition to any separate costs which he might have incurred—*Griffiths* v. *Kynaston* (1) [followed in the later cases *Bartholomew* v. *Stephens* (1839) (2), and *Norman* v. *Climenson* (3)].

After the Common Law Procedure Acts were passed the same principle was considered in *Redway* v. *Webber* (4), where in an action of contract one of two joint defendants was struck out of the action at the trial with costs under the provisions of the English Common Law Procedure Act, 15 & 16 Vict. c. 76, sect. 37, and the plaintiff had verdict and judgment against the other joint defendant. In that case it was decided that the principle in cases of tort applied in contract, and the defendant, who was struck out with costs at the trial, got half the general costs. There is a useful note in point in the present case, appended by the Reporter to that case. Now under the Judicature Act, 40 & 41 Vict. c. 57, sect. 53, *prima facie* costs follow the event, but that does not affect the principle now under consideration in the present case. It follows, therefore, that as Stevenson and Agnew joined in their defence,

(1) 2 Tyr. 757.
(2) 5 M. & W. 386.
(3) 4 M. & G. 243.
(4) 13 C. B. (N. S.) 254.

and verdict and judgment, with costs, passed for Agnew, he is entitled to half, and not the whole, of the general costs of the action, and we have only to apply this rule to the order of the Court of Appeal, which restores the verdict and judgment at the trial of the action, and ordered that the plaintiffs do pay Agnew "the costs of the said action." I agree with the argument of Mr. Hanna, that these costs, the payment of which is so ordered by the Court of Appeal, are such costs as were ordered at the trial by the Lord Chief Baron, whose judgment was restored, viz. such costs of the action as the defendant Agnew was then by law entitled to recover, *i.e.* one-half, and not the whole, of the general costs. By the order of the Court of Appeal the defendant Agnew is now entitled to tax and require payment of these costs, and therefore I think I am not called upon on the present motion to discuss the suggestions during the argument as to the present condition of the action, or possible results to the plaintiffs if they should proceed with their action and recover judgment with costs against Stevenson, and from any cause find themselves unable to obtain payment of the costs from him. The judgment with costs entered for the defendant Agnew at the trial, and the order of the Court of Appeal for payment of the costs to him, are absolute and unconditional, and he is entitled to enforce that judgment and order accordingly.

MADDEN, J. :—

If at the trial before the Lord Chief Baron judgment with costs had been given either for or against the defendant Stevenson, no difficulty would have arisen.

It is, I think, clear on the authority of the cases referred to by my brother Johnson that the defendant Agnew would in either event have been entitled, as against the plaintiffs, to no more than one-half of the costs jointly incurred on behalf of himself and Stevenson, all costs exclusively referable to Stevenson's defence having been deducted in the first instance. If in the result, on a completed record, Stevenson had obtained judgment against the plaintiffs with costs, he would have been entitled to receive the residue of the costs of the joint defence. If the plaintiffs had obtained judgment with costs against Stevenson, they would still

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have to pay Agnew's aliquot portion of the costs—no more and no less. On this part of the case I need do no more than express my concurrence with the judgment which has just been delivered. But it is argued these authorities do not govern the present case, for two reasons—first, because the action has not yet been decided as regards Stevenson, and, secondly, because Agnew's right to costs depends, not on the judgment at the trial, but on the order of the Court of Appeal, which makes no distinction between the costs in dispute and certain other costs which must admittedly be paid in full by the plaintiffs. As to the former point, if I am right in holding that a judgment either for or against Stevenson would leave Agnew in precisely the same position as regards the plaintiffs, our judgment cannot be affected by the circumstance that the ultimate result of the action has not yet been ascertained. If, however, the plaintiffs have now to pay to Agnew the costs of a defence which was partly on behalf of Stevenson, and Stevenson were finally ordered to pay the plaintiffs' costs, a curious result would ensue.

As regards the order of the Court of Appeal, if it stood by itself, there would be great force in the argument of Serjeant Dodd, founded on the case of *Kelly's Directories, Ltd.*, v. *Gavin & Lloyds* (1). But that order must be read in conjunction with the judgment of Palles, C.B., at the trial, which it restores in its entirety, and this restoration must, in my opinion, include the adjudication as to the costs of the action. I cannot suppose that in restoring the judgment at the trial the Court of Appeal intended to give the defendant Agnew rights against the plaintiffs different from those which that judgment conferred on him. The costs of the action which the plaintiffs are ordered to pay by the Court of Appeal are, in my opinion, those to which the defendant Agnew was entitled under the restored judgment. This seems to me to be a reasonable construction of the order of the Court of Appeal, and I concur in the judgment of my brother Johnson.

Solicitor for the plaintiffs: *Wm. Alexander.*
Solicitor for W. J. Agnew: *J. Alexander.*

R. ST. J. C.

(1) [1901] 2 Ch. 763.

THE KING (AT THE PROSECUTION OF THE COUNTY COUNCIL OF THE COUNTY OF KERRY, ACTING THROUGH THE COMMITTEE FOR THE KILLARNEY DISTRICT LUNATIC ASYLUM) *v.* JAMES D. LEAHY, ARBITRATOR APPOINTED BY LOCAL GOVERNMENT BOARD FOR IRELAND (1).

K. B. Div. 1902. Nov. 12.

County Council—Lunatic asylum—Compulsory acquisition of land—Arbitrator—Power to award accommodation works—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *s.* 10—*Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 2, 203—*Public Health (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 19), *s.* 8—*Railways Act (Ireland)*, 1851 (14 & 15 *Vict. c.* 70), *s.* 9—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *sched.* 2.

By a Provisional Order of the Local Government Board a County Council was empowered to put in force, with respect to the acquisition of certain lands, the compulsory powers of the Lands Clauses Acts, which Acts were in the Provisional Order defined to mean "the provisions of the Lands Clauses Acts as amended by the provisions contained in the 2nd schedule of the Housing of the Working Classes Acts, 1890, and sect. 8 of the Public Health (Ireland) Act, 1896." By a subsequent order of the Local Government Board an arbitrator was appointed:—

Held, that the arbitrator had no power to award the making of accommodation works by the County Council, such as a wall to be built around the lands to be acquired.

CERTIORARI.

The prosecutors, the County Council of the County of Kerry, acting through the Committee for the Killarney District Lunatic Asylum, had obtained from the Local Government Board for Ireland a Provisional Order empowering them to put in force the powers of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement, with reference to certain lands in the Co. Kerry required for the purpose of providing a recreation ground for the female patients of the Killarney

(1) Before GIBSON, MADDEN, and BOYD, JJ.

K. B. Div. 1902. R. (KERRY CO. COUNCIL) v. LEAHY.

District Lunatic Asylum. The order provided that: "In this order the expression the 'Lands Clauses Acts' means and includes the provisions of the Lands Clauses Acts as amended by the provisions contained in the 2nd schedule of the Housing of the Working Classes Act, 1890, and section 8 of the Public Health (Ireland) Act, 1896." By a subsequent order of the Local Government Board the defendant was appointed arbitrator between the County Council and the persons interested in the lands, and he held an inquiry at which were represented the County Council, the Earl of Kenmare the landlord of the lands in question, and Thomas J. Lyne, the tenant and occupier. It was contended on behalf of Lord Kenmare that the arbitrator should by his award direct that a wall should be built by the County Council round the lands to be acquired similar in height and character to the boundary wall enclosing the existing grounds of the asylum. On the part of the County Council it was contended that no such accommodation work should be included in the award. The arbitrator, by his award, in addition to awarding compensation for the lands to be taken, awarded that the County Council should for the accommodation of the adjoining lands build a wall around the lands to be taken similar to the existing boundary wall.

The County Council obtained a conditional order for a writ of *certiorari* to bring up and quash the award on the ground (*inter alia*) that the arbitrator had no authority to direct the execution of the accommodation works mentioned in the award (1). Cause having been shown, the present motion was on behalf of the prosecutors to have the conditional order made absolute notwithstanding cause.

D. B. Sullivan, K.C. (with him *Muldoon*), for the prosecutors:—

By section 9, sub-sect. 1, of the Local Government (Ireland) Act, 1898, it is the duty of the County Council, acting through a

(1) The award was also impeached on the ground that there had been an oversight in the mode in which compensation had been allocated as between the landlord and the tenant; but, as the Court was of opinion that this ground of objection was covered by a consent entered into between the parties at the time of the arbitration (see judgment of Gibson, J., *infra*, p. 321), the case is not reported on this point.

committee, to provide sufficent accommodation for the lunatic poor in the county in accordance with the Lunatic Asylums Acts; and by sub-sect. 5 they are empowered to manage and maintain every lunatic asylum in the county. By sect. 10 of the same Act a County Council for the purpose of any of their powers and duties may acquire land, and for the purpose of this section, section 203 of the Public Health (Ireland) Act, 1878, is to apply with the necessary modifications. Section 203 of the Public Health (Ireland) Act, 1878, incorporates the Lands Clauses Acts, which by sect. 2 of the same Act are defined to include, amongst other statutes, the Railways Act (Ireland), 1851, and the Railways Act (Ireland), 1864. By section 9 of the Railways Act (Ireland), 1851, the arbitrator had power to provide for the making of accommodation works, and if that section still applied, no doubt the arbitrator here would have had power to direct the making of the wall. We submit, however, that the provisions of the Railways Acts have been displaced by the 8th section of the Public Health Ireland (Act), 1896, which enacts that for the purpose of taking lands compulsorily under the Public Health (Ireland) Acts, 1878 to 1890, the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement shall be deemed to be amended by the provisions contained in the 2nd schedule of the Housing of the Working Classes Act, 1890, and the provisions of that schedule are incorporated with the Public Health (Ireland) Acts, 1878 to 1890. The provisions of the 2nd schedule of the Housing of the Working Classes Act must be taken as substituted for those contained in the Railways (Ireland) Acts, the two sets of provisions being inconsistent and incapable of being read together. By the Railways Act (Ireland), 1851, maps and schedules of the lands required and also of any proposed accommodation works are to be made out (sect. 4); the arbitrator is appointed by the Board of Works (sect. 5). He is to make out, in the first instance, a draft award, and subsequently, after hearing objections, a final award; an appeal by way of traverse is given to the person whose lands are taken if dissatisfied with the compensation or the accommodation works awarded (sect. 26), and by the Railways Act (Ireland), 1864, sect. 1, a right of appeal is also given to the Company where the amount awarded

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exceeds £500. Comparing the provisions in the 2nd schedule of the Housing of the Working Classes Act, 1890, we find that clause 1, which provides for the making out of maps and schedules of the lands to be taken, is silent as to accommodation works; by clause 4 the arbitrator is to be appointed by the confirming authority, that is, in the present case, by the Local Government Board; one award only is to be made, which is final, subject to the provisions as to appeal (clause 9); an appeal is allowed only where the amount of the compensation exceeds £1000, and even then only by leave of the High Court (clause 26). The effect, we submit, of section 8 of the Public Health (Ireland) Act, 1896, is, as stated by Mr. Vanston in his Supplement to the Public Health Acts, p. 80, to substitute the provisions of the 2nd schedule of the Housing of the Working Classes Act, 1890, for the compulsory clauses of the Lands Clauses Acts; and as such schedule contains no power to direct the making of accommodation works, the award in the present case to that effect is bad.

Morphy, for Lord Kenmare :—

The right to have accommodation works awarded given by the Railways Act (Ireland) 1851, which Act, as is shown by the 13th section, was not intended to be confined to cases of lands taken for railway purposes, must be deemed still to exist. There is nothing in the 2nd schedule of the Housing of the Working Classes Act, 1890, expressly taking away such right, nor is it taken away by necessary implication, since the two sets of provisions may be read together. The body to appoint the arbitrator is no doubt altered, but once appointed his functions remain unchanged.

P. Kelly, for the defendant :—

Fences are distinct from accommodation works, and are dealt with separately by the 17th section of the Railways Act (Ireland), 1864.

Sullivan, K.C., in reply :—

In the 68th section of the Railway Clauses Consolidation Act, 1845, fences are expressly included among the accommodation works enumerated.

[GIBSON, J., referred to *Reg.* (*Moore*) v. *Abbott* (1).]

GIBSON, J.:—

This award, which has been made under section 10 of the Local Government (Ireland) Act, 1898, and the Provisional Order of the 4th June, 1901, is impeached on two grounds. As to one of these grounds, founded on there being a possible oversight in the allocation of compensation to the tenant, I do not propose to offer any opinion, as the matter appears to be covered by the consent entered into at the arbitration.

The main question argued by Mr. Sullivan is that this award is bad on its face, inasmuch as it purports to direct that the County Council, who are exercising compulsory powers of acquiring land, shall erect a wall, and a wall of a particular character, to form a boundary fence between the lands to be acquired and the rest of the Kenmare estate. The question depends on the construction of section 10 of the Local Government (Ireland) Act, 1898, and the Order in Council, which provides that—"In this Order the expression 'Lands Clauses Acts' means and includes the provisions of the Lands Clauses Acts as amended by the provisions contained in the 2nd schedule of the Housing of the Working Classes Act, 1890, and section 8 of the Public Health (Ireland) Act, 1896." The question is whether by the legislation under which these lands were acquired there is a power in the arbitrator to direct the making of a fence, wall, accommodation work—by whatever name it may be called—collateral to the power of assessing compensation. Should the arbitrator be wrong in his adjudication as to the obligation to make this wall, it may be that it will affect to a certain extent the assessment of compensation which can be claimed in respect of other lands of the same owner being injuriously affected. We considered this in the *Ned's Point Battery Case* (2), but the matter does not at present arise here.

Under the Lands Clauses Consolidation Act, 1845, there was no power to award the making of accommodation works or fences. Such power was given by the Railway Clauses Consolidation Act, 1845, and by our Railways Act of 1851 (14 & 15 Vict. c. 70),

(1) [1897] 2 I. R. 362.

(2) *Supra*, p. 192.

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which latter statute was primarily conversant with the case of Railway Companies, and comprises in one code the provisions of the Lands Clauses and the Railway Clauses Consolidation Acts of 1845. It gives in the case of lands compulsorily taken the power to award the making of accommodation works in addition to compensation.

The difficulty, which Mr. Sullivan pointed out in his clear argument, in the way of the view upon which the arbitrator acted in directing this wall to be made is founded on the language of the 2nd schedule to the Housing of the Working Classes Act, 1890. Under the Act of 1851 specific plans and schedules were required to be lodged by the Railway Company, showing, where necessary, the proposed accommodation works. The arbitrator was appointed by a particular body; he was obliged to make two awards—one provisional, the other final. In his award he had to dispose of the question of accommodation works if it arose before him. There was an appeal from his decision by way of traverse, originally limited to the person whose lands were taken, but ultimately partially extended to the acquiring Company. Contrast with these provisions those embodied in the Act of 1890. A different set of maps, in which there is no reference to accommodation works, is to be lodged; the arbitrator is appointed by a different body; instead of two awards, the draft and the final, there is one award; and instead of there being an appeal by way of traverse given to the dispossessed owner where dissatisfied with the compensation or the accommodation works awarded, an appeal is given only in respect of the amount awarded, subject to two restrictive conditions, that the amount exceeds £1000, and that the consent of the High Court is obtained.

There are three possible views which may be taken as to the effect of this legislation. 1st. The view urged by Mr. Sullivan, viz. that the 2nd schedule of the Act of 1890 necessarily displaces the previous legislation as to accommodation works. This, I think, to be the true view: there are different arbitrators, different maps, different awards, and different appeals. This is also apparently the view of Mr. Vanston, as appears from his note to sect. 8 of the Public Health Act of 1896, in his Appendix to the Public Health Act, p. 80.

The second view was not argued by counsel on either side, viz. that there may be two arbitrators, dealing with compensation and accommodation works respectively, making two separate awards governed by different statutes, and subject to two different appeals.

The third view is that urged by Mr. Morphy and Mr. Kelly, viz. that there is some composite result to be extracted from the legislation as a whole; that there is a right to accommodation works created by the Railways (Ireland) Act, 1851, and that this right cannot be done away with in the absence of specific language. In my opinion, however, it is impossible to harmonize the provisions of the Act of 1851 and the Act of 1890.

Mr. Kelly has also suggested that "fencing" is something different from accommodation works proper. I do not think that this could help him, because if accommodation works are not within the competence of the arbitrator fences cannot be either. Moreover, that fences are included in the expression accommodation works seems to be shown by the section of the Railway Clauses Act, 1845, to which Mr. Sullivan has referred us (sect. 68).

On the whole, it seems tolerably plain that the Housing of the Working Classes Act, 1890, which is the governing statute under which these lands were acquired, necessarily displaces the provisions of the Railways (Ireland) Act, 1851. Lord Kenmare has no real ground of complaint. If the lands were compulsorily acquired in England, the landowner clearly could not claim for accommodation works. The *certiorari* must be allowed.

MADDEN and BOYD, JJ., concurred.

Solicitor for the prosecutors: *F. H. Downing.*
Solicitor for the defendant: *Wm. Leahy.*
Solicitor for the Earl of Kenmare: *E. J. Downing.*

J. G. T.

K. B. Div. 1902. Nov. 11.

IN THE MATTER OF THE LOCAL GOVERNMENT (IRELAND) ACT, 1898, THE ACT 5 GEO. 3, c. 30, AND THE SEVERAL ACTS AMENDING THE SAME, AND OF AN INTENDED CONVEYANCE FROM THE TRUSTEES OF THE COUNTY INFIRMARY OF THE CO. OF TYRONE TO THE COUNTY COUNCIL OF THE SAID CO. OF TYRONE (1).

County Council—Vesting of property in County Infirmary—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *section* 15—*Schedule to Application of Enactments Order*, 1898, *Art.* 15—5 *Geo.* 3, *c.* 20, *and amending Acts.*

The property in a County Infirmary is, by the effect of Art. 15 (1) of the Schedule to the Local Government (Application of Enactments) Order, 1898, vested in the County Council of the county.

SPECIAL CASE for the opinion of the King's Bench Division, at the instance and request of the Governors and Governesses of the Tyrone County Infirmary, pursuant to the Local Government, Ireland (Application of Enactments) Order, 1898, Art. 34. The material facts, as set out in the case, were as follows:—

Prior to the year 1782, and from that date to the month of October, 1899, there was in the town of Omagh a County Infirmary, for the county of Tyrone, under the provisions of the statute 5 Geo. 3, c. 20, and Acts amending the same. By deed dated the 24th February, 1899, Edward Charles Thompson, a tenant for life, and Henry George Alexander and Leopold Arthur M'Clintock, trustees of the settlement of the said Edward C. Thompson, in consideration of the sum of £2035, conveyed the site upon which the present Infirmary stands to the Duke of Abercorn, Emmerson T. Herdman, and the Rev. Patrick Mayne, as trustees upon trust for the erection of a new County Infirmary; and by deed dated the 29th March, 1899, the said trustees charged the said premises in favour of the said Henry George Alexander and

(1) Before GIBSON and MADDEN, JJ.

Leopold A. M'Clintock, with the said sum of £2035, with interest at 4½ per cent. The premises had been purchased by Edward C. Thompson under the provisions of the Land Purchase (Ireland) Acts, and were subject to an annuity of £48 16*s.* 4*d.*, and the annual tithe rentcharge of 17*s.*, payable to the Irish Land Commission. The new Infirmary was erected on this site at a cost of £12,709 11*s.* 2*d.* (excluding the cost of furniture), which was raised partly by public subscription and partly by a contribution from the County Council of county Tyrone, under the provisions of the Local Government (Ireland) Act, 1898, of one-third of the said sum subscribed, and partly by the proceeds of the sale of the old Infirmary premises, which sale had been sanctioned by an order of the Vice-Chancellor. The new Infirmary was completed and opened for the use of patients in the month of October, 1899, and had since then been used as the County Infirmary. The County Council at present pay, as the Grand Jury of the county Tyrone did for many years, the usual surgeon's salary, and also the maximum sum now by law allowable to be paid, viz. £1400 annually, for support of the said Infirmary. The trustees were willing and anxious to convey the new Infirmary premises to the County Council of the county of Tyrone if legally entitled to do so, and the County Council was willing to take such conveyance if it could legally be done.

The question for the decision of the Court was:—"Should the new Infirmary premises be conveyed by the said trustees to the County Council of the county of Tyrone, or to the Governors and Governesses of the Tyrone County Infirmary, constituted under the Act 5 Geo. 3, c. 20."

The case came on for hearing on the 20th June, 1902, when the argument was ordered to stand over until next sittings in order that the Local Government Board should be served with notice.

Muldoon (with him *Drummond, K.C.*), for the Governors and Governesses of the Tyrone County Infirmary, referred to the following statutes, orders, and cases:—5 Geo. 3, c. 20 (Ir.); 45 Geo. 3, c. 111; 47 Geo. 3, sess. 2, c. 50; 48 Geo. 3, c. 113; 50 Geo. 3, c. 103, s. 14; 1 & 2 Geo. 4, c. 38, s. 8; 7 Geo. 4,

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c. 74; 1 & 2 Wm. 4, c. 48; 6 & 7 Wm. 4, c. 116, ss. 85, 86; Local Government (Ireland) Act, 1898 (61 & 62 Vict. c 37) s. 15; Schedule to Application of Enactments Order, 1898, Arts. 1 (*d*) and 15; Order of Local Government Board of 6th July, 1899, as to number of members of Joint Committees of County Infirmaries (1); *County Council of Donegal* v. *Herdman* (2); *Worcestershire Co. Council* v. *Worcester Union* (3).

Gaussen, for the County Council:—

We are willing to take a conveyance of the premises if the Court think that we are the proper parties to whom it should be made.

George Green, for the Local Government Board for Ireland:—

It is not clear whether the conveyance should be made to the County Council or to the Governors and Governesses, and the Local Government Board are desirous of having the decision of the Court on the point. [He referred to sect. 15, sub-sect. 2, of the Local Government (Ireland) Act, 1898.]

Gibson, J.:—

The Infirmary, as its name declares, is a County Infirmary. The statutes to which Mr. Muldoon referred us show that the Grand Jury had a power of sale, and that the powers which are applicable to asylums and jails extend to county infirmaries. We think this Infirmary vested in the Governors and Governesses, or trustees for their benefit; was held for public uses and purposes of the county; Art. 15 (1) of the Schedule to the Application of Enactments Order, 1898, applies, and by its effect the Infirmary is transferred to the County Council. The circumstance that the old Corporation of the Governors and Governesses still remains to some extent undissolved is not conclusive; it is continued for the purpose of taking part in the management of the institution, but this does not involve that it still remains owner of the buildings.

The case is one in which it was proper to obtain the opinion of the Court. We shall declare that the Infirmary premises should

(1) See Vanston's Local Government, pp. 560, 562.
(2) 1 New Ir. Jur. 105. (3) [1897] 1 Q. B. 480.

be conveyed by the trustees to the County Council of the county of Tyrone, each of the parties to abide their own costs.

K. B. Div. 1902.

In re TYRONE INFIRMARY.

MADDEN, J., concurred.

Solicitor for the Governors and Governesses of Tyrone County Infirmary: *Richard S. Holland.*

Solicitors for the County Council of Tyrone: *Dickie & Carson.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

J. G. T.

HOGG & ROBERTSON *v.* HOLDEN (1).

(1902. No. 9266.)

K. B. Div. 1902. Oct. 30.

Practice—Motion for final judgment—Long vacation—Time—Gen. Ord. XIV., Rule 1.

The long vacation will not be counted in the period at the termination of which a plaintiff is too late in moving for final judgment.

MOTION FOR FINAL JUDGMENT. The writ, which was specially indorsed with a claim for £4 16*s.* for goods sold and delivered, was served on July 28th, 1902. The defendant entered an appearance on July 30th, and put in his defence on July 31st. The plaintiffs moved for final judgment, under Gen. Ord. XIV., Rule 1, on October 23rd, 1902.

Cooper, for the defendant:—

This motion is late, and the plaintiffs have given no explanation of their delay: *Annally* v. *Comyn* (2). At the date of the motion for final judgment nearly three months had elapsed from the service of the writ.

Harley, for the plaintiffs:—

The defendant put in his defence prematurely, and with the

(1) Before KENNY, BARTON, and WRIGHT, JJ. (2) 30 L. R. Ir. 102.

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object of defeating a motion for final judgment. The long vacation commenced on August 2nd, when only four days had elapsed from the service of the writ, and in the meantime the defendant had put in his appearance and defence. The time limited for putting in a defence did not commence to run again until October 17th, the day after the long vacation terminated, and consequently only nine days had expired on October 23rd, when the plaintiffs instituted the present motion. Holmes, J., lays down in *Annally* v. *Comyn* (1) that "the proper time for such a motion (for final judgment) is before the expiration of the period limited for delivering a defence." Upon that ruling the plaintiffs are in time with the present motion: *Burton* v. *Eastwood* (2), and *M'Lardy* v. *Slateum* (3).

Cooper, in reply:—

The defence was put in on July 31st, solely because that was the last day on which it could be done before the long vacation. The rule suspending the running of time during the long vacation was never intended to apply to final judgment motions.

THE COURT held that no *onus* was cast on the plaintiffs to explain any delay up to the time the defendant put in his defence, and that with reference to the delay that had taken place since an excuse was alleged which was generally accepted, viz. that the long vacation had intervened. Final judgment granted.

Solicitor for the plaintiffs: *Ernest Merrick.*
Solicitor for the defendant: *Nicholas Shortall.*

J. L.

(1) 30 L. R. Ir. 102, at p. 106. (2) 27 Ir. L. T. R. 19. (3) 24 Q. B. D. 504.

MURPHY *v.* MURPHY (1).

(1902. No. 10215.)

K. B. Div.
1902.
Nov. 5.

Practice—Action for rent by personal representatives—Specially indorsed writ—Chattel real—Gen. Ord. III., Rule 6.

In an action by personal representatives of an intestate for rent which has accrued due from his tenants since his death, the writ is not specially indorsed unless it contains an averment that the intestate's interest was for a term of years.

MOTION FOR FINAL JUDGMENT. The plaintiffs were William P. Murphy and Marie Josephine Radcliff, administrators of Mary Anne Murphy, deceased, and John W. Perrin, Receiver under the Court of the estate of Mary Anne Murphy, deceased. The defendant was Eliza Murphy. The indorsement on the writ was as follows:—"The plaintiffs' claim is for £71 10*s.*, £34 thereof being arrears of rent due and owing by the defendant to the plaintiffs as administrators and receiver of the estate of the late Mary Anne Murphy, deceased, out of the house and premises known as Bermuda Lodge, Rock-road, Booterstown, county Dublin, held by the defendant from the late Mary Anne Murphy, deceased, under an agreement bearing date the 13th December, 1900, at the yearly rent of £34, payable quarterly in advance. The said defendant now holds the said premises as such and at the same rent, payable quarterly in advance. And the plaintiffs claim £37 10*s.*, being arrears of rent due and owing by the defendant to the plaintiffs as aforesaid out of the house and premises known as Strandville, Rock-road, Booterstown, held by the defendant from the late Mary Anne Murphy, deceased, under an agreement from the 1st day of May, 1901, at the yearly rent of £30, payable quarterly in advance. The said defendant holds the said premises as such and at same rent, payable quarterly in advance."

(1) Before KENNY, BARTON, and WRIGHT, JJ.

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Particulars were then given of four quarters' rent in respect of the first set of premises falling due respectively on September 14th and December 14th, 1901, and March 14th and June 14th, 1902; and of five quarters' rent in respect of the second set of premises, falling due respectively on August 1st and November 1st, 1901, and February 1st, May 1st, and August 1st, 1902.

It was admitted that all the rent sued for had accrued since the death of Mary Anne Murphy.

Pierce Nolan, for the defendant :—

The writ is not specially indorsed. The plaintiffs can only succeed in the action on the assumption that the tenure of Mary Anne Murphy was for a chattel term. That fact should have been stated on the face of the writ. Without such an averment there is a presumption that the premises are real estate, in which case the plaintiffs would fail in the action: *Synge* v. *Johnson* (1).

Jefferson, for the plaintiffs.

THE COURT held that in the absence of an averment that Mary Anne Murphy had only a chattel interest in the lands the writ was not specially indorsed. Motion for final judgment refused with costs accordingly.

Solicitor for the plaintiffs: *Gerald Byrne.*

Solicitors for the defendant: *T. F. O'Connell & Son.*

J. L.

(1) 2 New Ir. Jur. R. 64.

JAMES W. F. STAWELL *v.* MAURICE CURRAN (1).

(1902. No. 12,503.)

K. B. Div.
1902.
Nov. 6.

Practice—Ejectment for non-payment of rent—Special indorsement—Town parks—Gen. Ord. III., Rule 6 a—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47).

Upon a motion to set aside a writ of summons in ejectment for non-payment of rent, on the ground that it was not specially indorsed under Gen. Ord. III., Rule 6 a, it was argued that the lands sought to be recovered was not a holding within sect. 12 of the Land Law (Ireland) Act, 1896, and the rules thereunder, inasmuch as they had been held in 1889 to constitute a town park. The lands were pastoral in their character, and it was alleged by the defendant that they would now, by the operation of section 6 of the Land Law (Ireland) Act, 1896, come within the fair rent provisions of the Land Code:—

Held, that the writ should have been specially indorsed under Gen. Ord. III., Rule 6 a.

Held also, that if the plaintiff denied a sub-tenant's right under sect. 12 of the Land Law (Ireland) Act, 1896, on the ground that the lands in question did not constitute a holding within the section, he should have stated so in the special indorsement.

MOTION to set aside the writ of summons as irregular in not complying with the 12th section of the Land Law (Ireland) Act, 1896, and the rules of Court of the 8th March, 1897. The statement of claim on the writ averred that "representatives of Morgan M'Sweeny held part of Blackhorsefields, in the parish of Kinsale, barony of Kinsale, and county of Cork, as tenant to the plaintiff under a lease for a term unexpired at the yearly rent of £7 7*s.* 9*d.*, and the defendant is in possession as tenant or sub-tenant thereof. And the sum of £59 2*s.* due and ending the 28th day of September, 1902, is due to the plaintiff." Particulars of eight gales of rent were then set out and the indorsement wound up with a claim for possession of the premises. The defendant's affidavit, upon which the application was grounded, stated that the holding was an agricultural holding, that he was

(1) Before BARTON and WRIGHT, JJ.

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in possession as under-tenant to Ellen M'Sweeny at the yearly rent of £14, and in addition to Ellen M'Sweeny there were still other persons possessing interests in the holding as middlemen, of whom the plaintiff was the superior landlord. He further stated that he had paid and discharged the rent due by him to his immediate landlord, Ellen M'Sweeny, up to November 1, 1901, and at the date of the service of the ejectment writ on him there was due by him for rent of the holding only one half-year's rent, amounting to the sum of £7. The plaintiff's land agent in his affidavit stated that the premises consisted of fields within the burgage tenure of the town of Kinsale, which had a population of 5000 or thereabouts. The lands were all in grass, and there were the remains of an old house and out-office. The defendant carried on the business of a victualler, and had a shop and dwelling-house in the town of Kinsale. No person save the defendant was in possession of any part of the lands as tenant or under-tenant. In September, 1889, the defendant caused an originating notice to be served to have a fair rent of portion of the lands of Blackhorse-fields, and which included the premises the subject-matter of this action, fixed against his immediate landlord, Morgan M'Sweeny, and by an order of November 14, 1889, this originating notice was dismissed on the ground that the holding consisted of town parks. In an affidavit in reply the defendant swore that his chief occupation was that of a farmer. In addition to the small farm the subject of this action, he held and cultivated three other farms containing altogether about 350 acres, and did only a small business as a victualler, the latter business being chiefly attended to by his brothers. He submitted that though an application to fix a fair rent in respect of the holding at Blackhorsefields was dismissed in 1889, the holding was one for which a fair rent would now be fixed by the Land Commission Court, having regard to the provisions of section 6 of the Land Law (Ireland) Act, 1896, and the decisions thereunder. He also submitted that section 12 of the Land Act, 1896, and the rules of Court of March, 1897, applied to an agricultural holding, whether such holding was excluded from the rent-fixing provisions of the Land Acts or not, and that therefore the writ of ejectment in the action was informal and wrong.

Michael J. Dunne, for the defendant:—

This writ should have the special indorsement required by Order III., Rule 6a, of the Rules of 8th March, 1897, and it has not. Rule 6a applies to all ejectments for non-payment of rent when the holding is agricultural or pastoral, or partly agricultural and partly pastoral. The holding here is admittedly pastoral, and is within the rule.

The plaintiff suggests by his last affidavit that the holding is not within the Land Acts, or at least that defendant is not entitled to fix a fair rent, and alleges that an originating notice by the tenant was dismissed in 1889. That is immaterial, and is a question the Court will not try on this motion. Besides, the case was dismissed in 1889 on the ground that the holding was pastoral, and the Land Act of 1887 did not exempt pastoral holdings from the existing law as to town parks. But sect. 6 of the Land Act of 1896 extends to pastoral holdings the provisions of the Land Act of 1887 applicable to agricultural holdings, with respect to the question as to whether they are or are not to be deemed town parks.

Mountiford Longfield, for the plaintiff:—

The lands sought to be recovered have been adjudged to be a "town park," and are not a "holding" within sect. 12 of the Land Law (Ireland) Act, 1896, which must be interpreted by reference to the earlier statutes: see sect. 50, sub-sect. 3.

The new rule, No. 6a of Order III., is intended to give effect to the provisions of sect. 12, and therefore does not apply to the writ in this action.

BARTON, J.:—

This is a motion to set aside the writ of summons in this action of ejectment for non-payment of rent as irregular in not complying with Rule 6a of Order III. of the Rules of March, 1897, made in pursuance of sect. 12 of the Land Act of 1896. That rule contains provisions to the effect that in all actions for the recovery of a holding, or of lands including a holding agricultural or pastoral, or partly agricultural and partly pastoral in its character, for

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non-payment of rent, the writ of summons shall be specially indorsed in the manner prescribed by the rule, and that such special indorsement shall be in such one of the Forms 1, 2, 3, in Appendix C, section 8, as shall be applicable to the case. The writ in this case is not specially indorsed in accordance with the rule, and the action is for the recovery of a pastoral holding. Mr. Longfield, for the plaintiff, defends the form of the writ on the ground that the holding was decided to be a town park by an order of the Land Commission of November 14, 1889. The defendant's answer to this is, firstly, that by the 6th section of the Land Act of 1896 the law was altered so as to bring the holding within the fair rent provisions of the Act of 1881; and, secondly, that the question whether the holding is a town park or not is immaterial on this motion, because the rule prescribes this form of writ in every action for the recovery of a pastoral holding, and the rule is wide enough to cover town parks, which even though excluded from the Land Act of 1881, may be holdings agricultural or pastoral in their character. I think that this is the correct interpretation of the Rule; and on reference to the Rule and to Form No. 2, which would be the form applicable to the case, I see that provision is made for a case where a plaintiff contends that the sub-tenant's holding is not within the section. In such case he ought to say so in the special indorsement of his writ. That being so, I think this motion ought to be granted with costs.

WRIGHT, J., concurred.

Solicitor for the plaintiff: *F. O'Sullivan.*
Solicitors for the defendant: *Exham & Sons.*

J. L.

THE KING (AT THE PROSECUTION OF ALDERMAN KINGKERR AND OTHERS) *v.* R. J. NEWELL, AUDITOR OF THE LOCAL GOVERNMENT BOARD (1).

K. B. Div. 1903. Jan. 13.

Borough Council—Accounts—Audit—Local Government Board Auditor—Surcharge—Payments "contrary to law or unfounded"—Certiorari—*Local Government (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 109, *s.* 12).

The function of an auditor under sect. 12 of the Local Government (Ireland) Act, 1871, is not confined to the allowance or disallowance *in toto* of each item under review, and where a severable part of an item, which is otherwise legal, is contrary to law or unfounded in fact, it may be open to the Auditor to disallow the illegal or unfounded part without surcharging the whole.

The respondent, an Auditor of the Local Government Board, in auditing the accounts of the municipal borough of Belfast for the year ending 31st August, 1902, disallowed, as an illegal payment within the meaning of the 12th section of the Local Government (Ireland) Act, 1871, half a-guinea out of each guinea and a-half allowed by the Council of the said borough as a daily payment for subsistence to members of the Council and officials, when absent from home on municipal business:—

Held, on *certiorari*, that power to disallow a payment in the auditing of an account *prima facie* includes power to disallow a severable part of it; that (assuming such payments for subsistence to be legal in character) the Auditor was, in the first instance, and subject to review on *certiorari*, the judge of what was a reasonable amount, and might disallow as illegal any payment in excess of what he held reasonable.

Per Palles, C.B.: The jurisdiction of the Court on the hearing of a *certiorari* under the provisions of sect. 12 of the Local Government (Ireland) Act, 1871, is not merely to determine whether or not the Auditor has exceeded his jurisdiction, but is a plenary jurisdiction to decide the particular matter of complaint, whether involving matters of fact, or of law, or of both.

APPLICATION to make absolute a conditional order for a *certiorari* to remove into this Division for the purpose of being quashed "all and singular orders of disallowances and surcharges made by the said Auditor," the respondent R. J. Newell, in his "audit of the accounts of the Lord Mayor, aldermen, and citizens of the

(1) Before PALLES, C.B., and BARTON and WRIGHT, JJ.

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THE KING (KING-KERR) *v.* NEWELL.

municipal borough of Belfast in the month of August, 1902, together with the reasons for such disallowances and surcharges, whereby he disallowed as against the several prosecutors" various sums, amounting in all to £97 2*s.* 6*d.*, which were surcharged on the several members of the Council who signed the cheques drawn in payment thereof. The schedule to the order set out specifically the items so surcharged. The facts of the case appear sufficiently in the judgments.

The Solicitor-General (*J. H. Campbell, K.C.*), *Harrison, K.C.*, and *Overend*, for the applicants:—

The Auditor exceeded his jurisdiction in reducing these payments, which were admittedly made *bona fide*. He could have disallowed each payment *in toto* if "illegal" or "unfounded" within the meaning of section 12 of the Local Government (Ireland) Act, 1871; but that section gives him no authority to tax payments which are legal in character. Where such a power is intended to be exercised the Legislature provides for it expressly, as in section 95 of the Irish Poor Relief Act of 1838, where jurisdiction is given to auditors, not merely to disallow such payments as they shall deem to be illegal or unfounded, but also to reduce such as they shall deem to be exorbitant. No such power is given to auditors in dealing with municipal corporations. The ratepayers are sufficiently secured, as any payment that is at all colourable in its nature can be disallowed *in toto*.

Gordon, K.C., *Henry, K.C.*, and *Powell*, for the respondent:—

No statutory authority can be shown for these payments, which are merely allowed as a matter of favour on the part of the Auditor. Assuming them, however, to be legal in character, the Auditor is the proper judge of what is a reasonable amount, and can disallow as an illegal or unfounded payment any sum in excess of what he determines to be reasonable. The suggested restriction of the Auditor's power would apply to the audit of the accounts of every sanitary authority in Ireland: Public Health (Ireland) Act, 1878, section 248.

[The following cases were referred to during the argument :— *Rex* (*Ferguson*) v. *More O'Ferrall* (1); *Reg.* (*Duckett*) v. *Calvert* (2); *Reg.* (*Inglis*) v. *Drury* (3); *Reg.* (*Jackson*) v. *Newell* (4); *Reg.* (*M'Evoy*) v. *Corporation of Dublin* (5); *Reg.* (*Bridgeman*) v. *Drury* (6).]

Cur. adv. vult.

Jan. 26.

PALLES, C. B. :—

This is an application by certain members of the municipal body of Belfast to make absolute a rule for *certiorari* to quash disallowances, amounting to £97 2*s.* 6*d.*, made by an Auditor under the Local Government Board when auditing the accounts of the municipality. The sums so disallowed consist of one-third of certain payments for subsistence made to members and officers of the Town Council during legitimate absence from home at the request of the Corporation on its business. The payments made were at the rate of a guinea and a-half a day. The rate allowed by the Auditor was a guinea a day.

The reasons of the disallowance are thus stated by the Auditor :—" The sums disallowed represent payments for subsistence to members of the Council and officers when absent from home on Corporation business, in excess of the sum of a guinea per day, the maximum amount allowed in the case of any other public body of the kind in Ireland, and I am not aware of any statutory or other authority which would entitle members of the Corporation or officers to claim or receive more ; and I have given the Council ample notice that I would disallow anything paid in excess of the maximum referred to."

The affidavit upon which the motion was moved stated that a sum of a guinea and a-half per day for hotel expenses and subsistence had always been allowed in former years to members of the Council and municipal officers when absent from home with the authority of the Council on municipal business; that such allowances had the approval of the Council, and had been passed

(1) 1 New Ir. Jur. 230.
(2) [1898] 2 I. R. 511.
(3) [1898] 2 I. R. 527.
(4) [1898] 2 I. R. 530.
(5) 2 L. R. Ir. 371.
(6) [1894] 2 I. R. 489.

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at meetings of the Council to consider the accounts of the borough, and formerly had always been allowed by the Auditors of the Local Government Board in annual audits of the accounts, that the allowance was reasonable, and in many cases was not sufficient to cover the expenses reasonably incurred. It then states that the daily allowances under similar circumstances are:—In Edinburgh, to the Lord Provost, three guineas; in Glasgow, to the Lord Provost, three guineas; to other members, a guinea and a-half; in Liverpool, two guineas; in Plymouth, a guinea and a-half; and in Bradford, two guineas.

The Solicitor-General, at the commencement of his opening of the application, stated expressly and pointedly that the only question to be decided on the motion was one of law, viz. whether the Auditor had jurisdiction to disallow part of a payment made for a purpose which in its character was legal; in other words, whether the Auditor had jurisdiction to determine that the amount paid for a legal purpose was unreasonable or exorbitant, and to disallow the excess. His contention was that the Corporation, so long as they acted *with bona fides* (which in this case is admitted), are the sole judges of the *quantum* of allowance in respect of such expenses as are under consideration, that they had the power to fix the scale, and that the Auditor had no jurisdiction to consider whether such scale was reasonable.

To me it is extremely convenient that a question of principle of this nature, so important in relation to the efficiency of audits, and of such wide application, now (as we are told) raised for the first time for judicial determination, should be brought before us in this net form unembarrassed by details.

However, the example of the Solicitor-General was not imitated by the other learned counsel who addressed us. The first contention of Mr. Henry, the leading counsel for the Auditor, urged with all the earnestness that so distinguishes him, was that not only the one-third disallowed, but the entire of the sums charged, including the portion allowed by the Auditor, were without statutable authority, and therefore illegal. But it seemed to us that upon the true construction of the Act we had no jurisdiction to enter into that question. Our jurisdiction is limited to deciding "the particular matter of complaint set forth in the notice of the

intended application." The decision that two-thirds shall be allowed is not complained of; the complaint is that one-third was wrongly disallowed.

It is, however, to be distinctly understood that the Court does not indicate any opinion whether the payments in question are legal or not. No such payment can be legal unless it is authorized by statute expressly or impliedly; and having regard to the decision of the Auditor, which is not impeached by any ratepayer, we decline to consider whether the amounts actually allowed are outside that category. If the Auditor be of the same opinion as his learned counsel appears to be, it will be his duty at his next audit to disallow the entire of such items of a similar character as may appear in the accounts then under examination, and if that disallowance be brought before us on *certiorari*, we shall consider the legality of the disallowed payments to the best of our ability; I feel bound until then to treat the sums allowed as legal in character, as distinguished from amount.

Mr. Harrison, who appeared with the Solicitor-General, so far imitated Mr. Henry's example that when he came to reply he sought, in answer to arguments which at his request we had strictly limited to those arising on the construction of the statute, to open up a new consideration, expressly abandoned by the Solicitor-General, viz. that even if the Auditor had jurisdiction he exercised it erroneously by disallowing part of sums which were reasonable. I need not say that to allow such a question to be suggested for the first time in reply would be entirely against our practice. Had we done so we should have been obliged to rehear the application *de novo*, and for its satisfactory decision further affidavits showing the expenditure usually incurred by the deputations would probably have been necessary We could not reverse the Auditor's decision without holding that the sums allowed for subsistence by Parliament to witnesses examined before it are not *prima facie* reasonable for a member of a Town Council. As a greater sum is claimed, I should probably think, if I entered on the matter, that evidence should be given that such sum is insufficient to defray the actual expenses usually incurred by gentlemen in the position of the applicants. I desire, however, to except from this observation the Lord Mayor when he attends officially, *i.e.*

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to present an address to His Majesty or to one of the Houses of Parliament, or in any other case in which he acts *ex officio*, by which I mean does an act which could not be done by another member of the Council otherwise than as his deputy, or *locum tenens*. I therefore decline to express any opinion upon the question of reasonableness; but, for myself, in consequence of one line of my judgment in *The Queen* v. *Calvert* (1), I desire to state explicitly that my reason for adopting this course is not that in a proceeding such as the present the Court has not jurisdiction to entertain questions of fact, and to reverse the decision of the Auditor upon the weight of evidence. Whether such a course was within our jurisdiction or not occurred to me in the case I have referred to, but it was unnecessary to decide it, as I thought that there was no evidence of the contract upon which the Auditor disallowed the payments in respect of which the question there arose. Having referred to the mode provided by the statute for impeaching the disallowances being by *certiorari*, I said :—"Nothing appears in the section which prevents the application of the ordinary rules"—in the plural—"applicable to the impeachment by that writ of other judicial decisions, and applying what I conceive to be these ordinary principles, I hold that if there be no evidence to sustain the conclusion of fact upon which the disallowance is grounded, that disallowance cannot be sustained."

I would have more accurately expressed my view had I used the word "rule" in the singular. This modification, however, affects neither the decision nor the grounds of it. Upon further consideration of the question, I am satisfied that this Court can go even further, and that it has full jurisdiction to determine, in a sense different from the conclusion at which the Auditor arrived, any question of fact that may have arisen. I recur to the words of the section :—"The said Court shall decide the particular matter of complaint set forth in such statement, and no other." Jurisdiction to *decide the matter of complaint* is wholly different from the jurisdiction of this Court upon a *certiorari* for the removal of an order of Justices of the Peace. In the latter case our jurisdiction is to determine whether the Justices have exceeded their

(1) [1898] 2 I. R. 511.

jurisdiction. In the former it is a plenary jurisdiction to decide the particular matter of complaint, whether that complaint involves matter of fact, or of law, or of both. Whether or not, the Solicitor-General in limiting his argument in the manner I have stated was misled by the passage I have read from my judgment in the former case, I do not know. If he were we shall entertain any application he may make in reference to re-argument.

Having thus, at, I fear, too great length, cleared the case from considerations on which I do not propose to enter, I come back to the important question raised by the Solicitor-General. It must be admitted that, if he is right in his contention, the audit of municipal accounts will be divested of half its value; but be this as it may, if the statute has not given the Auditor the jurisdiction, we cannot regard the consequences.

The question depends upon a few lines of section 12: "Every Auditor acting in pursuance of this Act shall *examine into the matter of every account*, and shall disallow and strike out of every such account *all* payments, charges, and allowances made by any person and charged upon the funds of any town *contrary to law*, or which he *deems to be unfounded*, and shall surcharge the same upon the person making or authorizing the making of the illegal payments."

In the first place, then, he is to examine into "the matter," which of course means the whole matter, of "the account," and includes every item of it, and he is to disallow and surcharge the same upon the person making the illegal payment. What does this expression "illegal payment" include? Everything within either of the two previous categories: viz. every payment "contrary to law," and every payment "which he deems to be unfounded." These latter words have been much criticised. I confess that I think them transparently clear.

Mr. Justice O'Brien, in *Regina* v. *Drury* (1), decided in 1897, says:—"If Mr. Meredith's view be right, the power to surcharge is confined to what is illegal, and therefore there would be no power of surcharge at all in regard to a matter that was merely unfounded, if unfounded is distinguishable from what is illegal.

(1) [1898] 2 I. R. 529.

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How he can escape that difficulty I cannot see in any way whatever. The plain and obvious construction is that 'contrary to law or unfounded' means the same thing as unfounded in point of law or unfounded in point of fact."

I entirely agree in the view thus expressed. In a later case, *The Queen* v. *Calvert* (1), decided in 1897, Mr. Justice O'Brien seems to have modified that view. "At first," he says, "I entertained some doubt as to what the meaning of the word 'unfounded' might be in the section of the Act of 1871. It was under discussion in a former case in this Court. It may be that it would be too narrow a construction to confine it to what is unfounded in fact, as opposed to what is unfounded in law; and I certainly am not inclined in the least degree to derogate from the authority of the Auditor in cases of this kind, or to narrow his authority so that he could not under this head of 'unfounded' have the power to deal with all payments of an unnecessary or extravagant kind."

Neither am I inclined to derogate from or to narrow the authority of the Auditor; but I am of opinion that, under the construction I have adopted, he has complete authority over every illegal payment. This I think very clear. Every payment is illegal which is not authorized by statute, and in relation to its legality it is impossible that more than two classes of questions can arise. First, it may be a payment of a *character* which is not authorized by statute. As to it, therefore, the only question would be one of law. *Ex facie*, and without recourse to evidence, it would be illegal, and in my view would be within the expression "contrary to law" in the earlier part of the section. The only jurisdiction the Auditor has as to such a payment is to disallow it and surcharge its amount. If he allowed it he would not only commit an error, but he would exceed his jurisdiction, for he could not, by a decision erroneous in point of law, give himself jurisdiction. The class of payments which are to be disallowed are not those which he *deems* to be contrary of law, but such as *are* contrary to law.

But, secondly, a payment for a purpose *ex facie* authorized by statute may not, in fact, have been made, or there may be a matter

(1) [1898] 2 I. R. 525.

of fact upon which its illegality may depend. Innumerable instances of this might be given. I may take, for an instance, the circumstances under which the seal was attached to the contract with Santry in the *Killarney Case* (1). Now, in my view, the Auditor is given a judicial authority to determine all these relevant matters of fact, although they arise in relation to a payment of a character *ex facie* authorized.

It being the duty of the Auditor to disallow payments which are either contrary to law or unfounded in fact, on what intelligible ground can we be asked to hold that a payment, in part contrary to law and in part according to law, or in part founded in fact and in part unfounded in fact, shall either be wholly disallowed or allowed in its entirety? To pursue either course in respect of it would be grossly unjust, and would be against the principle of accounting, as judicially recognised in all our Courts. Wherever a payment is severable, where the portion in excess of the right can be, in law, severed from that within the right, the excess only is to be disallowed. To construe the section so as to permit or enjoin this merest act of justice nothing more is necessary than to read the words "payments" distributively; and so to read it is, to my mind, undoubtedly its true construction.

The only argument against this construction to which I think it necessary to refer is, that the 12th section of the Act of 1871 (1 & 2 Vict. c. 56), is in *pari materia* with section 95 of the Irish Poor Relief Act of 1838, and that if we contrast this 12th section with section 95 of the former Act we will find not only the words "shall examine into the matter of every such account, and shall disallow out of every such account all such charges and payments as they shall deem to be illegal or unfounded," but also the words "and shall reduce such as they shall deem to be exorbitant." It is argued that the omission from the Act of 1871 of the words authorizing reduction of exorbitant charges deprives the Auditor of the power of doing so.

I do not deny that this section 95 may be taken to be in *pari materia* with the Act of 1871; but I believe that the reason why the words referred to were omitted is because they were redundant

(1) *R.* v. *Calvert*, [1898] 2 I. R. 511.

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and tautologous. Power to disallow a payment in the auditing of an account *prima facie* includes power to disallow a separable part of it. The fact that the two sections are in *pari materia* might afford, were it necessary, an argument against, instead of in favour of, the applicants.

Now to deal with the payments actually in question here. It is not pretended that any statute has fixed the actual rule of the daily subsistence allowance; therefore the only amount legally allowable is a reasonable sum. The payment by the Corporation, to any of its members or officials, of any excess above this reasonable sum would be illegal. What is a reasonable sum is a matter of fact which the Auditor must himself determine. His determination involves this: that the payment, to the extent of the sum fixed as reasonable, is legal, and, as to the excess, is illegal. The Auditor was, in the first instance, and subject to review by us, the judge of the amount which was reasonable. We, for the reasons already stated, have declined to review his decision of fact, which, therefore, stands. The legal result of that decision is that, to the extent of a guinea a day, the payments are legal, and as to the residue illegal.

For these reasons this application, in my opinion, fails, and the conditional order must be discharged. The Auditor must have his costs out of the rates.

BARTON, J.:—

The Lord Chief Baron has expressed the opinion that, having regard to the course of the argument, and the terms of "the matter of complaint" submitted to us, our decision in this case ought to be limited to the point presented in the argument of the Solicitor-General. So far as that limited point is concerned, I concur in the judgment of the Court. I cannot accede to the Solicitor-General's contention, which I understand to be to the effect that the Auditor has no jurisdiction in any case to disallow and surcharge part of an item in the accounts of a public authority, but must either allow or disallow the whole item. I do not find it necessary to refer to the words of section 95 of the Poor Relief Act of 1838 (1 & 2 Vict. c. 56). I do not think that much difficulty arises on the words of section 12 of the Local Government Act, 1871. If a

severable part of an item, which is otherwise legal and well founded, is illegal or unfounded, it may be open to the Auditor to treat the illegal or unfounded part as in itself *pro tanto* an illegal or unfounded payment or allowance, and to surcharge it without surcharging the whole item.

I must add, however, that I have some doubts as to the applicability of our decision to the circumstances of this particular case. Mr. Henry, who represented the Auditor, was prepared to argue that some of these payments were altogether illegal and unauthorized. He pointed out that such allowance to members of a local authority have been authorized in certain exceptional cases, *e. g.* by the Local Government Conferences Act, 1885 (48 & 49 Vict. c. 22), and by the Local Government (Ireland) Act 1902, sect. 16 (2 Edw. 7, c. 38), but he contended that they have never been authorized for some at all events of the purposes with which we are concerned in this case. If so, the Auditor ought to have disallowed such payments *in toto*. On the other hand, after the arguments had closed, Mr. Overend, for the Belfast Council, mentioned a section in the Local Act of 1845, bearing on the question of the power of the Belfast Council to make allowances to their officers. But there was no discussion or suggestion of this or of any other section to a like effect in the course of the argument. It occurs to me that the statutory provisions regulating the powers of the Council in respect of these payments ought to have been considered by the Auditor before he made the disallowances, and ought to have entered into the argument of this case. I cannot help thinking that the question of the legality of such allowances, and the further question, whether it is the Auditor or the Council that has jurisdiction to say what is reasonable, may depend largely upon the construction of the particular statute applicable to each item, and that in a case of this kind one of the first things to be looked at is the language of the statute (if any) regulating the payment, and defining the powers and discretion of the localauthority as to the payment.

As the statutory provisions regulating these payments have not been brought to our notice, we are hardly in a position to express an opinion as to the legality of all or any of these payments, or

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Barton, J.

as to the extent of the discretion or jurisdiction of the Belfast Council in reference to them. But I understand that, for the reasons stated by the Lord Chief Baron, the scope of our decision is limited to the point presented in the argument of the Solictor-General; and I concur with the other members of the Court that the function of an Auditor under section 12 of the Local Government (Ireland) Act, 1871, is not confined to the allowance or disallowance *in toto* of each item under review.

WRIGHT, J., concurred.

Solicitor for the applicants: *Sir S. Black.*
Solicitors for the respondent: *Allen & Halpin.*

R. ST. J. C.

M'INERNEY *v.* THE "CLAREMAN" PRINTING AND PUBLISHING CO. (1).

K. B. Div. 1902.
Nov. 14, 18, 19. Dec. 1.
Appeal. 1902.
Dec. 18, 19, 1903. Jan. 15.

Libel—Newspaper publication—Matter of public interest—Newspaper Libel Act—Verdict of "No libel" found by jury—New trial—Power of Court to grant.

The jurisdiction and duty of the Court in dealing with the finding of a jury upon the question of "libel or no libel" considered: they are the same in kind and in principle as upon any ordinary issue of fact upon which the jury is the final tribunal: the difference, if any, is only of degree.

The plaintiff, an auctioneer and farmer at E. in the county of Clare, took a farm, near E., which had been surrendered by tenants named F., who were not willing to give the rent which the plaintiff agreed to pay. T. F., a brother of the former tenants, brought the matter before the United Irish League, and the matter was discussed at several meetings. Between 3rd October, 1901, and 25th January, 1902, several publications appeared in the defendants' paper about the matter. The first was a letter written by T. F. on the 3rd October, 1901, which he concluded by saying "that he would continue to denounce the grabber until justice was done to his victims." The last was a report, stating that shots had been fired at houses of parties who had purchased goods from an E. merchant who had "become very notorious." The intervening publications complained of consisted of reports of resolutions passed at meetings of the League, at which plaintiff was described as a grabber, and his conduct was denounced. After the first three meetings the plaintiff appeared before two meetings of the League, to explain the circumstances under which he took the farm, at the first of which nothing was done, and at the second there was an investigation by the committee, at which he was not present. He stated that he would appeal to the executive tribunal of the United Irish League, and he wrote a letter, stating his grounds of defence to the charge of landgrabbing, which the defendants published in their paper. The plaintiff's business was ruined in consequence of these publications. The plaintiff did not pursue his appeal to the executive of the United Irish League, but brought the present action, the libels complained of being the letters written to, and the reports of meetings published in, the defendants' paper. The defendants pleaded no libel, fair comment, and a special defence under the Newspaper Libel Act, that the resolutions of the League branches were published in the ordinary course

(1) In the King's Bench Division, before KENNY, BARTON, and WRIGHT, JJ.

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of business, and were fair reports of proceedings of public meetings concerning matters of public interest. At the trial the Judge left the question of libel, or no libel, to the jury, and they found that the publications were not libels. Counsel for the plaintiff asked for a direction on the special defences, but the Judge, to avoid the necessity of a second trial, left the issues of fact on the special defences to the jury, who found that the matters commented on and published were matters of public interest, and they likewise found the other issues in favour of the defendants:—

Held (affirming the decision of the King's Bench Division), that the verdict should be set aside; that the publications did not relate to matters of public interest, but to the private transactions of two individuals; that a verdict on the special defences ought to have been directed for the plaintiff; that the plaintiff was not estopped by his conduct from showing that the transaction was not a matter of public interest, and that there ought to be a new trial, as the issue of libel or no libel should have been decided independently of the other issues, and the jury might not have clearly apprehended the real issues to be tried.

THE plaintiff was an auctioneer and shopkeeper at Ennistymon, in the county of Clare, and he also carried on the business of a farmer in the said county. A farm of 300 acres near Ennistymon fell vacant in September, 1900; the tenants were John and Margaret Flanagan, and the agent stated they held it in equal shares. The rent was £65 per annum, and they owed £180 arrears of rent. They complained that the rent was too high, and offered £45 a-year for it; the plaintiff offered £50 a-year, and was accepted. The farm was surrendered in September, 1900.

There were several branches of the United Irish League in the county of Clare, at Corofin, Inagh, and Kilshanny—places a few miles from Ennistymon; and the defendants were the proprietors and publishers of a newspaper which circulated largely in Clare and the adjoining counties. A meeting of the United Irish League was held at Ennistymon on the 29th September, 1901, when at the end of the meeting Timothy Flanagan, a brother of the tenants, endeavoured to address the meeting on the subject of the plaintiff taking the farm. The Rev. Mr. Fitzgerald, who was in the chair, refused to permit him; and on the 5th October, 1901, the following letter appeared in the *Clareman*—being the first libel complained of:—

"THE ENNISTYMON MEETING.

"To the Editor of the *Clareman*.

"GLENQUIN HOUSE, KILNABOY,
"*3rd October*, 1901.

"DEAR SIR,—I think it only fair to myself, and to all concerned, to explain my position as regards the incident which occurred at the termination of Sunday's meeting at Ennistymon. I was under the impression, and expected up to the last moment, that the glaring case of landgrabbing to which I referred would be alluded to by some of the speakers. Seeing that no mention was made of it, I thought it my duty to make the remark I did. In the excitement of the moment I quite overlooked the fact that I should, in the first instance, have obtained the Rev. Chairman's consent to speak, and I apologise for the unintentional omission. At the same time I repeat that I only considered it my duty to do as I did, and that I will continue to denounce the grabber until justice is done to his victims.

"Yours faithfully,

"TIMOTHY FLANAGAN,
"*Chairman Corofin D.C.*"

A meeting of the United Irish League was held at Corofin on the 27th October, 1901, and in the *Clareman* of the 2nd November the second libel appeared, being a report of what took place at that meeting :—

"It was unanimously resolved that the grabbing of Messrs. Flanagans' farm by M'Inerney, auctioneer, Ennistymon, be condemned in the strongest manner possible, and that intimation of same be sent to the Ennistymon Branch of the League, Messrs. Flanagan being members of this branch."

The third libel consisted of a report in the *Clareman* of the 16th November, 1900 :—

"A most enthusiastic and representative meeting of the Ennistymon Branch, at which a letter from the Corofin Branch, *re* the Flanagan–M'Inerney case, was read to the effect that the case has again to be considered before a special meeting of the branch, to be held on the 17th November, when full particulars would be sent to the Ennistymon Branch."

The fourth libel complained of consisted of a report in the *Clareman*, published on the 23rd November, 1901, of a meeting of the Corofin Branch on the 17th November, 1901, to the following effect :—

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"Corofin Branch.—There was an enormous attendance at the meeting of this branch, held on yesterday, 17th inst., and the amount of business laid before it showed the root the League in this district had taken, and the confidence evinced. Mr. T. Flanagan, J.P. and C.C., presided, and the following members of the committee, including treasurer and secretary, were present—Messrs. O'Brien, Keane, Griffey, D.C.'s.; D. M'Donnell, Mackey, O'Loughlin, Sullivan, Kenny, Fogarty, Reidy, and Cullinan. A letter was read from the Ennistymon Branch in reference to the grabbing of the Flanagans' farm by Messrs. M'Inerney, of which notice thereof had been given to the Messrs. Flanagan, who now appeared to deny the truth of the allegations made or reported to be made by M'Inerney, viz. that they got compensation for same from him amounting to the buying of the interest or goodwill. After describing how they had been put out of these farms by M'Inerney, Mr. Pat. Flanagan supplemented same by handing in the following written statement:—

'Gentlemen,—My father was tenant to the lands of Crumlin and Knockanes for a great number of years to the late William Fitzgerald. The rent which we paid for same was £65 per annum; it was grazed in common between my late brother John and myself. There was a false report circulated that I consented to have M'Inerney take these lands, and that for same I received £90, and that only for the interference of some friends I would not take less than £100. In addition to same, it was also falsely reported that my sister Margaret got £50 for being a consenting party. I am in a position to prove, and on oath if necessary, that M'Inerney never said one word to me regarding same, or to my sister Margaret, or the representatives of my brother John, or ever spoke to us relative to the buying of our goodwill, which we would not part with for any pecuniary consideration. I am paying the rent that was due up to the present. I also paid three levies of poor rate, which of course I would not pay only being sure of being reinstated. I beg also to refer, for the information of the friends of M'Inerney, who, through the false reports before alluded to, were in doubts as to whether or not it was a grabbing case, to sales of meadowing belonging to Mr. John Collins, Cood and Kilfenora, which were entrusted to M'Inerney, who issued posters withholding his own name as auctioneer. When he came on the lands to auction same a large crowd of would-be purchasers were there, but on seeing who the auctioneer was a few made purchases only to throw them up again, and the sale proved abortive until another auctioneer, Mr. Dillon, Ennis, resold on issuing fresh advertisements and posters.

'(Signed), Pat Flanagan.

'*To* the U. I. L., Corofin.'

"At the concluding of the reading of this, the Chairman asked how

it was that M'Inerney got the lands if they (the Flanagans), were in possession?

"Mr. Flanagan replied that they considered the rent too high, and offered £45 per annum. M'Inerney gave £50.

"Mr. Griffey—It is a simple case of grabbing, and I propose that the branch condemns same in the strongest manner possible, and call upon all the outside branches to do their duty in the matter.

"Mr. Parnell Roche—I second that. If this grabbing is countenanced we won't be there at all.

"The resolution was unanimously adopted."

About the 1st December, 1901, the plaintiff went to Father Fitzgerald, and stated he was ready to prove that he lawfully got possession of the farm, and offered to attend before the Ennistymon Branch and clear himself of the charges.

The plaintiff also wrote a letter, dated the 16th January, 1902, to the editor of the defendants' paper, enclosing a letter from Miss Flanagan, to the following effect:—

"14*th January*, 1902.

"SIR,—At Mr. Fitzgerald's (1) request, I write to you to say that I voluntarily surrendered to him the farm at Crumlin and Knockanes, which you subsequently took, and that I have not any objection to your retaining possession of it.

"MARGARET FLANAGAN.

"*To* MR. JOHN M'INERNEY."

The defendants published this letter. The plaintiff also wrote another letter to ths editor of the *Clareman*, justifying his conduct in taking the farm, which the defendants published.

The next libel complained of appeared in the *Clareman* of the 14th December, 1901, publishing a report of a meeting of the Ennistymon Branch on the 8th December, 1901, to the following effect:—

"MORE POLICE IMPERTINENCE—DECISION OF THE COMMITTEE.

"Sunday's meeting of the Ennistymon U. I. L. was the most important yet held by that branch, and the throng of people assembled about the premises of the League rooms during the proceedings was evidence of the deep local interest taken in its work. The consideration of the complaint made by Messrs. Flanagan, of Corofin, against Mr. John M'Inerney, auctioneer, was the topic of conversation on all sides, and undoubtly threw a heavy responsibility on the

(1) The Mr. Fitzgerald here referred to was the landlord.

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members; but as the result will show they acquitted themselves admirably, and thoroughly deserved the complimentary expressions of the Chairman, Father Fitzgerald, at the close of the meeting. Previous to the opening of the meeting the District Inspector, with the Head Constable and a number of the local police, forced their way into the room. The District Inspector asked for the Chairman, and was informed by Mr. Corney Flanagan that he had not arrived. He then asked if there was any objection to his presence, and Mr. Flanagan said yes, and ordered him to leave. The District Inspector asked by what authority he ordered him to leave, and he answered that the room belonged to the League, and that they were renting it from the landlady Mrs. O'Brien. Mr. P. Connellan, Moughera, told the Inspector that the room was theirs, and in forcible language informed him they would see he left.

"The District Inspector—Who are you?

"Mr. Connellan gave his name.

"Mr. Byrne (Secretary)—The League is not proclaimed, and on what authority do you and your men come here?

"The District Inspector—Who are you?

"Mr. Byrne, a member of the United Irish League—What is your name? My name is well known.

"Both Mr. M'Inerney and the Flanagans were in attendance and in the League room up to the time the place was cleared for the committee to discuss the matter.

"The following are the facts of the case as gathered by the *Clareman* representative who was in attendance. The farm in question is situated in Crumlin and Knockanes, and was held by the Flanagan family since the year 1851 at a yearly rent of £65.

"After the death of Mr. Flanagan, senior, the land passed into the hands of his widow and children, and was held jointly by them at this rent until last year, when, considering the amount too high, they surrendered it for an abatement. There was rent due off the holding at this time, and legal proceedings were taken for its recovery, and it was stated on behalf of the Flanagans that they are still paying the amount and costs, though now not in possession of the farm. On the 15th of October last, 1900, the agent on the property wrote to the Flanagans offering them the farm at £55 a-year, but this they refused to give. On the 23rd of November they received a further letter from the agent stating that he would let them the farm at £50 a-year, but the Flanagans still held out, offering £45 for it. Mr. M'Inerney, it was stated, then took the farm at £50 a-year.

"There being doubts as to a letter received from Miss Flanagan at the previous meeting, the following, authenticated by Father Donovan, of Corofin, was read from her at the meeting:—

'Carnane, Corofin.

'Dear Sir,—In compliance with your wish, I just drop you a line as there was doubt about my handwriting. As regards our land, I

went to Mr. Wilson Fitzgerald, in Kilkee, and stated to him that I could not pay the present rent, and therefore should surrender.

'I also went to the agent, and he recommended me to sell my interest in the farm. I replied no one would buy it, as it was too dear. As I stated to you before, I never saw Mr. M'Inerney, or heard from him.

'Yours respectfully,

'MARGARET FLANAGAN.'

"Pat Flanagan was called into the room, and produced the documents to substantiate his case. He said that they would accept no compensation.

"A messenger was then sent to Mr. M'Inerney, and the following communication was forwarded by him:—

'DEAR REV. CHAIRMAN,—Since my accuser, Miss Margaret Flanagan, the late tenant and beneficial owner of the farms referred to, has failed to attend, I respectfully refuse to go into any defence. Thanking you personally for your past efforts on behalf of justice and fair play. I am quite indifferent about the decision of the committee, which I shall both ignore and despise.

'I shall, however, have this case reheard (if necessity demands) by a representative tribunal.

'Yours faithfully,

'JOHN M'INERNEY.'

"The tone of the letter was unanimously condemned.

"The following resolution was unanimously adopted:—

"That having heard the statements made by Messrs. Flanagan and M'Inerney in connexion with the Crumlin and Knockanes farm, we are of opinion that the Messrs. Flanagan have proved their case; that Mr. M'Inerney's action in taking and holding the farm is entirely against the principles of the U. I. L.; and we call on him, in accordance with his pledge at last meeting, to immediately surrender the farm in question."

"The Chairman thanked the committee for the very patient hearing that they had given to the matter. It has been rumoured that the case would mean the 'smash up' of the League, and he himself was told that his head would be knocked off him over it that day. A Voice—I wish we saw anyone try it (cheers and laughter).

"Continuing, Father Fitzgerald said he was glad they agreed on the matter so amicably. He told the people that he was there for the cause of Ireland, and the League would not be smashed for anyone (loud cheers).

"The members were admitted, when the secretary read the resolution passed by the committee, which met with entire approval.

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"Threat of an Action.

"Mr. Thomas Malone, Laheray, then produced a letter which he had received from Mr. F. G. Kerin, solicitor, Ennis, stating he had been instructed by Mr. John M'Inerney, auctioneer, Ennistymon, to institute proceedings against him for a slanderous statement made at the United Irish League meeting on the 1st December, and asked him to name a solicitor to accept service of a writ of summons.

"Mr. C. Flanagan—If the case goes on we must uphold Mr. Malone and the League, and we will (hear, hear). If Mr. Malone did make a remark, I certainly say we will uphold him to the last (cheers). Two days ago I was told this would be the downfall of the League in Ennistymon. A Voice—They were false prophets (laughter).

"Chairman—I favour no man, Mr. M'Inerney or anybody else; I favour the cause only. We are parting good friends, and success to the League.

"The meeting then concluded, the Chairman being loudly cheered on leaving the room.

The plaintiff and the Flanagans were in attendance in the League room up to the time the place was cleared for the committee to discuss the matter, but the plaintiff then withdrew on the ground that Margaret Flanagan had failed to attend. He handed in a statement refusing to go into his defence, but saying that he would have the case reheard by a "representative tribunal," by which he meant the "executive authority" of the League. He refused afterwards to take this course, and brought this action.

The sixth libel consisted of a publication by the defendants of a report of a meeting of the Corofin Branch on the 21st December, 1901, to the following effect:—

"Before going into the general business a discussion was entered into between the committee as to the best means of giving effect to the resolution, previously passed and forwarded to other branches, regarding the Flanagan-M'Inerney grabbing case. Their action in passing such resolution having been gone into and endorsed by other branches, it was decided to further the principles by passing a further resolution on the matter."

The seventh libel consisted of a publication in the *Clareman* of the 28th December, 1901, of a report of a meeting of the Inagh Branch on the 22nd December, to the following effect:—

"A resolution, proposed by J. Barry, seconded by J. Longe, endorsing the resolution condemning M'Inerney, the Ennistymon grabber, was passed unanimously."

The next libel consisted of a report in the *Clareman* of the 4th January, 1902, of a meeting of the Kilshanny Branch on the 22nd December, to the following effect:—

"The next business taken up was the consideration of the Flanagan and M'Inerney case. The following resolution was proposed by Mr. Tom Nagle, seconded by Mr. Mortimer Considine, and unanimously passed:—'That having before us the facts of the case as reported in the local papers, we must disapprove of the action of Mr. John M'Inerney, auctioneer, in overholding, in direct violation of his promise, this farm, possessed by the Flanagans for half a century.'"

The last libel consisted of a publication in the *Clareman* of the 25th January, 1902, to the following effect:—

"WHOLESALE SHOOTING AT KILSHANNY.

"During the week no fewer than five or six parties in Kilshanny have been fired at. In one house the shot was fired through the window, and shattered a lamp that stood on a table some distance inside the window. In the others the parties only came into the yard and fired the shots into the air.

"The reason assigned is that the parties purchased goods from an Ennistymon merchant who has become very notorious."

This last statement, if at all true, was proved to be a gross exaggeration. In consequence of these publications the plaintiff's business was ruined.

The defences, besides traverses, were "no libel," fair comment, and as to all publications except the first and last, the Newspaper Libel Act, 1888, that the words complained of in paragraphs 4 to 10 inclusive (by a clerical error 11 in the pleading) *i.e.* all but the first and last of the eight publications "were published by the defendants in the ordinary course of their business as public journalists, and were fair and accurate reports of the proceedings of public meetings, held at places and times appearing by reference to the said reports respectively; that the matter was in each case of public concern, and its publication was for the public benefit."

The case was tried before Gibson, J., and a special jury of the city of Dublin, at Trinity Sittings, 1902. The publications were admitted at the trial. At the close of the evidence counsel for the plaintiff asked for a direction as to the special defences on the grounds:—(1) That the defendants refused to publish an apology;

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(2) that the meetings were not proved to be public meetings; and (3) that the matters were not of public interest, or that the publication was not for the public benefit.

Later, after the Judge had summed up, *O'Shaughnessy, K.C.*, for the plaintiff, renewed the requisition, and relied on the additional grounds that there could be no protection where no reporter was present, private defamation not being protected by the Act; and that there was no evidence that the reports of the meetings were (save as to those at which Father Fitzgerald was present) correct. The Judge was of opinion that the defence founded on the Newspaper Libel Act was not made out, but to avoid the necessity for a new trial he left the issues of fact on the point to the jury, explaining what was necessary to be proved to support the defences. The following were the questions left to the jury, and the answers thereto :—

1. Were the publications complained of, or some and which of them, libels or a libel? *Answer*—No.

2. So far as they are comments—A. Are they, or some or which of them, honest, fair comments on facts? *Answer*—Yes. B. Were the matters commented on matters of public interest? *Answer*—Yes.

3. Were the meetings of the committees public meetings? *Answer*—Yes.

4. Were the branch meetings public meetings? *Answer*—Yes.

5. Were the reports of the meetings fair and accurate? *Answer*—Yes.

6. Were the meetings held for lawful discussion of matters of public concern? *Answer*—Yes.

7. Were the publications matters of public concern and for the public benefit? *Answer*—Yes.

8. Did the defendants act maliciously? *Answer*—No.

9. Did the plaintiff request, or did the defendants refuse, the publication of a reasonable letter or statement by way of contradiction or explanation? *Answer*—No.

10. To what damages (if any) is the plaintiff entitled? *No answer.*

Upon these findings the jury found for the defendants by direction of the Judge, and his Lordship gave judgment for the defendants with costs.

The plaintiff moved to set aside the verdict and judgment, and for a new trial.

O'Shaughnessy, K.C. (with him *Gordon, K.C.*, and *W. F. Kenny*), for the plaintiff:—

The finding of the jury that the publications were not a libel should be set aside; because it is so obviously a libel to stigmatise a man as a grabber in the county Clare that it was not open to the jury to find that such words were not a libel. The test is: Could twelve honest and reasonable men come to the conclusion they did upon that issue? I deny that they could. If words are capable of both an innocent and a defamatory meaning, and the jury find either one or the other, the Court will not interfere: *Burgess* v. *Bracher* (1); *Walter* v. *Beaver* (2); *Naden* v. *Micocke* (2); and *Grant* v. *Yates* (3). But if the words are not capable of an innocent meaning, and if the reference is plain as to the person about whom they are used, the Court will interfere: *Levi* v. *Milne* (4); *Hakewell* v. *Ingram* (5); *per* Field, J., in *O'Brien* v. *The Marquis of Salisbury* (6); *Webster* v. *Friedeberg* (7); and *Commissioners for Railways* v. *Brown* (8). If it is a verdict which is plainly unfair, wrong, and unreasonable, the Court will not allow it to stand simply because it is a case of libel. In this respect libel is on the same footing as any other tort.

One of the provisoes of section 4 of the Law of Libel Amendment Act of 1888 is: "That nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit"; and then by way of interpretation the section proceeds: "For the purpose of this section 'public meeting' shall mean any meeting *bona fide* and lawfully held for

(1) [1724] 8 Mod. 238.
(2) [1684] 3 Lev. 166.
(3) 2 T. L. R. 368.
(4) 4 Bing. 195.
(5) 2 C. L. R. 1397.
(6) 6 T. L. R. at p. 137.
(7) 17 Q. B. D. 736.
(8) 13 A. C. 133.

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a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted." The proceedings of an unlawful Court, such as was held here, are neither a meeting for a lawful purpose nor is their publication for the public benefit. Public meeting is defined by the section. It must be held for a lawful purpose, and *bona fide* held for that purpose. It has been proved that these words held the plaintiff up to odium and contempt—in fact there is no controversy about it. During the course of the trial there was not a suggestion by anyone that the publications were not a libel. The plaintiff was denounced. The denunciation was such that his cattle were savagely maimed, that his customers were terrified by shots being fired at them, and when he comes into Court against the newspaper that gives circulation to these libels he is denied justice, and has to pay the costs of his opponent.

Sullivan, K.C., and *Redmond Barry, K.C.* (with them *Phelps*), for the defendant Company:—

The plea of fair comment, which was conversant only with the head-lines which the reporter put to his report, could not have been withdrawn from the jury. The publication headed: "Wholesale Shooting at Kilshanny" was the account of a real occurrence. No doubt that publication injured the plaintiff; but a newspaper cannot be held responsible for publishing the narration of an actual occurrence, although it may be calculated to injure the person against whom the outrage referred to was perpetrated.

As to the correspondence that passed, the defendant newspaper published impartially both sides of the controversy. It printed the letter of Flanagan; but it also printed the letters of the plaintiff in reply. The newspaper did not exclude a single line addressed to it in reference to this occurrence. That fact cannot be excluded from consideration when considering the finding of "No libel."

It is erroneous to suggest that in order to entitle a newspaper to the protection of the Newspaper Libel Act the meeting reported should be open to the public or to the police. It has

been held that a ticket-meeting is within the statute. These were meetings of an organization which has never been pronounced to be an illegal organization, and they were held to discuss matters of public interest.

In supporting this finding of "No libel" we join issue with the proposition that libel is on exactly the same footing as any other tort. That proposition is fallacious, incorrect, and entirely unsustainable in law. In the case of other torts you set aside verdicts if in the opinion of the Court they are unreasonable or against the weight of evidence. In the case of libel you cannot touch the verdict unless it is perverse or corrupt. In the one case it rests on the view the jury took of the facts; in the case of libel it is a matter of opinion alone, and the opinion of the Court cannot be substituted for the opinion of the jury. Our proposition is that which was laid down by Lord Kenyon, seven years after Fox's Act was passed: "A man may publish anything which twelve of his countrymen think is not blameable": *King* v. *Cuthell* (1). In the case of *O'Brien* v. *The Marquis of Salisbury* (2), Field, J., after quoting with approval the opinion of Tindal, C.J., in *Broome* v. *Gosden* (3), that in libel the jury must be manifestly wrong, and there must be a miscarriage of justice, proceeds: "The jury are the appointed tribunal for the decision of the question of libel or no libel, and the Court ought not to invade their province unless it can be plainly seen that the verdict is perverse, or so unreasonable as to lead to the conclusion that the jury have not honestly taken the facts into their consideration."

Such a verdict has only been set aside in three reported cases in 130 years, viz.: *Parmiter* v. *Coupland* (4); *Levi* v. *Milne* (5) and *Hakewell* v. *Ingram* (6). In *Odger* v. *Mortimer* (7), which was decided in 1873, Bovill, C.J., says at p. 473, "It is only in cases where the Court can see that the jury are clearly wrong that the Court should interfere." Grove, J., says in the same case, "If there be a ground of action which the Court should hesitate to interfere with more than another, that ground of action is libel";

(1) 27 State Trials, at p. 675.
(2) 6 T. L. R. at p. 137.
(3) 1 C. B. 731.
(4) 6 M. & W. 105.
(5) 4 Bing. 195.
(6) 2 C. L. R. 1397.
(7) 28 L. T. (N. S.) 472.

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and he adds that that interference should not take place unless the reason is "overwhelmingly strong." Honeyman, J., says, "Here we have a special jury of the city of London finding after great deliberation (on which plea it is immaterial) a verdict for the defendant in an action for libel, and I think we cannot interfere." In *Saxby* v. *Easterbrook* (1), Lord Coleridge, C.J., says "Libel or no libel, since Fox's Act, is of all questions peculiarly one for a jury."

The perverse verdict referred to by Field, J., is where the jury knowingly find what is wrong; for instance where they find a man innocent because they disapprove of the law. The dishonest verdict is one given through some improper motive, as where the jury find for the defendant because they know he cannot pay. In *Levi* v. *Milne* (2) the verdict was plainly dishonest, because the jury intended to find the publication to be a libel, but found it to be no libel, when the Judge informed them in answer to a question that a verdict for 1*s.* would carry costs. The ground of decision in *Hakewell* v. *Ingram* (3) was that the verdict was perverse, and the authority relied upon was *Levi* v. *Milne* (2). *Parmiter* v. *Coupland* (4) was not cited as an authority in support of the decision although referred to.

The test is not the sense that the people in Clare might put upon the words. It is the sense in which the jury interprets them. See judgment of Lawson, J., in *Mawe* v. *Pigott* (5). In judging of these words in which a man is called a grabber the jury were not bound to lower themselves to the standard of those who regard that expression as a reproach. It was open to the jury to say that to so describe the plaintiff was not a libel at all; that in being what the expression described him to be he deserved well of his country.

W. F. Kenny, in reply :—

The learned Judge who tried the action is dissatisfied, as appears from his report, with the finding of "No libel." This

(1) 3 C. P. D. 339, at p. 342.
(2) 4 Bing. 195.
(3) 2 C. L. R. 1397.
(4) 6 M. & W. 105.
(5) I. R. 4 C. L. 54.

we submit should be taken into serious consideration. In *Webster* v. *Friedeberg* (1) Lord Esher says, "It is idle to say that, in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the Judge who tried the case. No one has ever said his opinion is conclusive, but it is a matter to be taken into serious consideration."

The general rule is that if a verdict of a jury was one which reasonable men could not have found it will be set aside: *Metropolitan Railway Company* v. *Wright* (2); *Webster* v. *Friedeberg* (1); explaining *Solomon* v. *Bitton* (3); *Commissioners for Railways* v. *Brown* (4). The general rule is applicable to the present case. Fox's Act (32 Geo. 3, c. 60) puts the finding of a jury in a criminal proceeding for libel in the same position as the finding of a jury in any other criminal case. The finding of a jury on the trial of an indictment for assault or any other criminal matter is final, but in an action at the civil side of the Courts arising out of the same subject-matter the verdict can be set aside if necessary. In *Hakewell* v. *Ingram* (5) the jury found for the defendant on the issue of "guilty or not guilty." A rule for a new trial was obtained on the grounds "that the verdict was against the weight of evidence and was perverse." The Court set aside the verdict on the ground that it was against the weight of evidence. Jervis, C.J., in giving judgment at p. 1399, said, "The true effect of the statute was this: before the statute it was the habit of the Judges to state their opinion whether the paper was a libel, as a matter of law, and confine the jury to the question of publication. And the statute said that the case of libel shall be like any other case of criminal proceeding."

The finding need not be "perverse or dishonest," as counsel for defendants contended. The passage read by Mr. Sullivan from Field, J's., judgment in *O'Brien* v. *Salisbury* (6) should be read in conjunction with the subsequent part: "In order to see whether the jury can have reasonably come to the conclusion they arrived at, or have acted on some wrong principle, I have considered

(1) 11 A. C. 152.
(2) 17 Q. B. D. 737.
(3) 8 Q. B. D. 176.
(4) 13 A. C. 133.
(5) 2 C. L. R. 1397.
(6) 6 T. L. R. 137.

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the evidence very carefully, and am quite satisfied that no such miscarriage occurred, and that the jury thoroughly understood what was the matter they had to decide." In *The Australian Newspaper Company* v. *Bennett* (1), in an action for libel in which the jury found that the matter complained of was not defamatory, the Lord Chancellor lays down the rule "the only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men." [Counsel referred to *Broome* v. *Gosden* (2); *Capital and Counties Bank* v. *Henty* (3); *Levi* v. *Milne* (4); *Parmiter* v. *Coupland* (5); *Hearne* v. *Stowell* (6); *Goldstein* v. *Foss* (7).] *Mawe* v. *Pigott* (8) has not been followed in recent cases.

The verdict is clearly against the weight of evidence. In dealing with the defences of fair comment and under the Newspaper Libel Act, 1888, the jury got confused. In Clare the word boycotter has a well-understood meaning, and there to apply to a person such an expression has the result, as in the present case, of injuring if not ruining his business. The evidence adduced for the defendants explains the sinister meaning to be attached to the word. The Kilshanny shooting outrage, which appeared in defendants' paper, must not be read alone, but in conjunction with the series of libels complained of, and then its true meaning is apparent. The plea of fair comment or under the Newspaper Libel Act, 1888, cannot be relied on. The meetings were illegal and for the purpose of injuring the plaintiff; many of them were held in private, and a private dispute could not be said to be a matter of public interest.

Dec. 1.

KENNY, J.:—

This is a motion on behalf of the plaintiff to set aside the verdict and judgment in this action on the grounds that the former was against evidence and the weight of evidence, and that no evidence was given by the defendants in support of the finding of "no libel," and that the Judge at the trial should have

(1) [1894] A. C. 284.
(2) 1 C. B. 731.
(3) 7 A. C. 741.
(4) 4 Bing. 195.
(5) 6 M. & W. 105.
(6) 12 Ad. & E. 719.
(7) 6 B. & C. 154.
(8) I. R. 4 C. L. 54.

directed a verdict for the plaintiff on the defences of "no libel" and "fair comment," and on that founded on the Newspaper Libel Act of 1888.

The action was tried before one of the most experienced Nisi Prius Judges on the Bench, with a special jury of the city of Dublin. It was brought by the plaintiff, who is a shopkeeper, farmer, and auctioneer, carrying on his business in the town of Ennistymon, in the county of Clare, for alleged libels published by the defendant company in their local newspaper called the *Clareman*, which, according to the evidence of the editor, is owned by several gentlemen, including some clergymen. The alleged libels are set forth in paragraphs 3 to 11 inclusive of the statement of claim, and are represented by a letter, seven reports of meetings of the body known as the United Irish League, and an item of news in which, it is contended, the plaintiff was disparagingly referred to. Having regard to the course of the trial, it becomes necessary to briefly refer to the nature and form of the pleadings. The statement of claim contained a prefatory averment that the plaintiff by reason of his taking a farm in the county of Clare, formerly occupied by another tenant, incurred the hostility of certain persons in the county and also of the United Irish League, which had several branches in the county, and exercised a considerable influence amongst the inhabitants of the same and of the adjoining counties. In the letter and reports of meetings which then followed the plaintiff was referred to as, what has come to be popularly known as, a "grabber"; and in the item of news which dealt with an alleged "wholesale shooting at Kilshanny" the newspaper gave as the reason for the alleged outrage that the parties in whose vicinity the shots were fired purchased goods from the plaintiff, "who had become very notorious of late." The statement of claim added a general innuendo—applicable to all the publications—namely, that the plaintiff was guilty of harsh, dishonest, and dishonourable conduct in becoming tenant of the farm, and that he was a person to be shunned, and that persons should have no dealings with him as an auctioneer or farmer. It was finally alleged that by reason of the matters complained of he had suffered in his business, and he claimed £2000 damages and an injunction.

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The statement of defence, in addition to traverses, pleaded "no libel" as to all the publications; and, as to so much of them as were expressions of opinion, fair comment upon matters of public interest. It also—as to all—relied on a defence founded on the 4th section of the Law of Libel Amendment Act, 1888. This defence and that of fair comment involved the averments that the matters commented on and reported were matters of public interest and concern, and the former also necessitated allegations:—(1) Of accuracy of the reports; (2) that the meetings were public meetings; and (3) that the publication of the matter was for the public benefit.

At the trial, apparently with the tacit assent of the parties, the learned Judge put no questions to the jury founded on the innuendoes. I would not at all gather that his reason for this course was dictated by any doubt as to the publications being susceptible of the meanings expressly assigned to them, but would rather infer, having regard to the same Judge's report in *Fisher* v. *The Nation Newspaper* (1), that he thought that any such questions would tend to embarrass the jury. He left to them the question of "no libel" and seven others, all of which properly arose on the defences of "fair comment" and under the Libel Act of 1888. The jury found every issue in the defendants' favour. They found:—(1) "No libel"; (2) that the comments were fair comments on public facts, and that the matters commented on were of public interest; (3) that such of the meetings of the United Irish League as were committee meetings were *public* meetings; (4) that the branch meetings of that association were public meetings; (5) that the reports of the meetings were fair and accurate; (6) that the meetings were held for lawful discussion of matters of public concern; (7) that the publication was of matter of public concern and for the public benefit; and (8) that the defendants did not act maliciously.

At the close of the defendants' case counsel for the plaintiff asked for a direction in his favour on the special defence, on the grounds that the defendants refused to publish an apology; that the meetings were not proved to be public meetings; that the matters were not of public interest, and their publication was

(1) [1901] 2 I. R. at p. 470.

not for the public interest; that where no reporter was present the Act of Parliament afforded no protection to what was really private defamation; and that as to the meetings (with the exception of two) there was no evidence that the reports were accurate. The learned Judge declined to direct; but he states in his report that as to the plea of "fair comment" he was inclined to think it was not established, as the plaintiff's conduct did not appear to be a matter of public interest, and no facts were proved to justify the plaintiff's condemnation; and as to the defence founded on the Act of 1888, he was of opinion that such defence was not made out, but to avoid the necessity for a new trial he states that he left the issues of fact on the point to the jury, explaining what was necessary to be proved to support the defence.

It will be observed that the learned Judge takes no express notice of the circumstance prominently brought to his observation by the plaintiff's leading counsel, Mr. O'Shaughnessy, namely, that there was no evidence to go to the jury of the accuracy of the reports of some of the meetings. It now appears that there was not a particle of evidence in the case that the reports of three meetings at Corofin and one at Kilshanny, all relied on by the plaintiff as being defamatory, were accurate, or indeed that any such meetings were, as a matter of fact, ever held, and on a special issue left to this jury as to the accuracy of these reports, and as to the meetings being public meetings, they appear to have had no hesitation in giving an affirmative answer. It seems to me that this finding—to say nothing of the findings of the matters being of public interest and for the public benefit—throws a strong light upon the sort of consideration and deliberation which the jury must have given to this case.

As to the findings on the special defences, and on "no libel," the learned Judge further states:—"I considered that the finding as to the special defences were open to question, and raised important questions of principle worthy of further argument . . . As to the finding of 'no libel' (a jury question), the jury may have been influenced by the plaintiff's conduct in apparently submitting to the jurisdiction of the League, and publishing letters of vindication in the defendants' paper, but so far as regards the letter and reports of meetings, my view did not

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coincide with that taken by the jury. I thought that the letter and reports were calculated to hold the plaintiff up to censure, and that he had done nothing to forfeit his right of complaint (if he had any), though his behaviour ought properly affect the question of damages. As to the Kilshanny report, my opinion agreed with that of the jury."

From these observations it is clear that Mr. Justice Gibson did not, to say the least, approve of the finding of the jury on the issue of no libel, save as to the Kilshanny outrage report. The opinion of the Judge who tries a case is, I need scarcely say, a very serious element when the propriety of the verdict is challenged, but it is by no means conclusive : *Council of Brisbane* v. *Martin* (1).

Two further matters as to the course of the trial must be alluded to. The defendants did not ask for a direction, and we have it stated at the bar, and apparently acquiesced in, that the plaintiff's counsel tendered evidence as to the meaning of the word "grabber" and the sense in which it would be understood by readers of defendants' paper, but Mr. Justice Gibson stated that the meaning was well understood, and that such evidence was unnecessary, and accordingly it was not given.

I have now stated at some length the circumstances of this case so far as the pleadings and the course of the trial are concerned ; and inasmuch as the Court is unanimous in thinking that there should be a new trial, I shall endeavour in the further remarks I shall make to avoid any unnecessary criticism on the facts that were disclosed in evidence. One circumstance in the case, however, it is all important to notice. It is proved by Father Fitzgerald, the chairman of two of the meetings, that a man named Byrne, who was not produced at the trial, was secretary of the League branch—that he was a trader in the same business as the plaintiff, and in the same town, and that it was the duty of this man to forward the reports to the defendants' newspaper.

Two questions were discussed before us : the one whether the rules applicable to the granting of a new trial, as laid down by cases of which *Wright* v. *The Metropolitan Railway Co.* (2) is a leading

(1) [1894] A. C. 249. (2) 11 A. C. 152.

example, are to be our guides in libel actions, or whether in the latter a more stringent and a more rigorous principle has been established. The other question for determination is whether the circumstances are such as to warrant our sending the case to a new trial. In connexion with this latter question the arguments have been devoted altogether to the finding of "no libel," counsel for the defendants admitting that it was the all-important and practically governing issue in the case. In ordinary actions of tort, *Wright* v. *The Metropolitan Railway Company* (1) supplies the general test for adoption in new trial motions. The Lord Chancellor, Lord Selborne, sitting in the Court of Appeal, says it is not enough to disturb the verdict of a jury that the Judge who tried the case, or the Judges in the Court where the new trial is moved for, might have come to a different conclusion from the jury on the evidence; but there must be such a preponderance of evidence as to make it unreasonable and *almost perverse* that the jury, when instructed and assisted properly by the Judge, should return such a verdict. In the House of Lords Lord Herschell (who had then succeeded Lord Selborne as Lord Chancellor) says:—"The case (an action of negligence) was one unquestionably within the province of a jury; and in my opinion the verdict ought not to be disturbed unless it was one which the jury, viewing the whole of the evidence reasonably, ought not properly find." Lord FitzGerald considers that in order to set aside the verdict it should appear to be not only unsatisfactory but unreasonable and unjust; and the present Lord Chancellor, Lord Halsbury, says that if reasonable men might find the particular verdict the Court has no jurisdiction to disturb it. He adds that the test of reasonableness is right enough in order to understand whether the jury have really done their duty, and that if their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them. These rules of conduct were applied subsequently in numerous cases. In *Praed* v. *Graham* (2), where it was sought to disturb the verdict in an action of libel on the ground of excessive damages, Lord Esher says:—"If the Court thinks, having regard to all the

(1) 11 A. C. 152. (2) 24 Q. B. D. 53.

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circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought to interfere." To the same effect is *Brown* v. *The Commissioners of Railways* (1) in the Privy Council, where there being evidence on both sides properly submitted to the jury, and the Council being of opinion that the verdict was neither unreasonable nor unfair, and it appearing that the Judge at the trial did not dissent, reinstated a verdict which the Court below had set aside. See also Lord Macnaghten's judgment on a further motion for a new trial apparently between the same parties in L. R. 15 Ap. Cas., at p. 250, and also his judgment in *Phillips* v. *Martin* in the same volume, at p. 194. It will be found that in libel actions language similar to that used in these cases has been adopted. My brother Barton has referred me to three such cases: namely, *Coulson* v. *Coulson* (2), *Liverpool Household Stores Association* v. *Smith* (3), and *Monson* v. *Tussauds, Limited* (4). Lord Esher's judgment in the first of these three cases is cited with approval by Cotton and Lopes, L.JJ., in the other two. The application was one for an interim injunction to restrain a libel, and Lord Esher says that, to justify the order, the Court must come to a decision on the question of "libel" or "no libel" before the jury decided whether it was a libel or not—that the jurisdiction was therefore of a delicate nature and ought only to be exercised in the clearest cases where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as *unreasonable*.

But it is said that the language used in these cases is not applicable to cases of findings of "libel" or "no libel," and that these stand on a different footing from the findings in other actions of tort. The reasons alleged for the distinction, as I understand them, are, that since Fox's Act the issue is exclusively a jury one, that the question is one not of fact but of opinion, and that the opinion of the Court cannot be substituted for that of the jury which is the constituted tribunal. This argument has not been pushed to the length of claiming absolute and complete infallibility for the jury's finding, but it is said that before we disturb the

(1) 13 A. C. 133.
(2) 3 T. L. R. 846.
(3) 37 Ch. D. 170.
(4) [1894] 1 Q. B. at p. 693.

verdict we must be satisfied that the jury acted either perversely or corruptly. For that contention we are referred to the judgment of Field, J., in *O'Brien* v. *Salisbury* (1). The defence there was "fair comment," and the jury found for the defendant. In refusing to make an order for a new trial, Field, J., after referring with approval to *Broome* v. *Gosden* (2), says:—"The jury are the appointed tribunal for the decision of the question of libel or no libel, and the Court ought not to invade their province unless it can be plainly seen that the verdict is *perverse* or *so unreasonable* as to lead to the conclusion that the jury have not honestly taken the matters into their consideration. . . . I cannot say that the verdict is unreasonable so that it ought to be set aside." Comparing this language with that of Lord Selborne in *Wright* v. *The Metropolitan Railway Co.* (3), I can find no substantial difference between them. Lord Selborne's words are "unreasonable and almost perverse"; and Lord Halsbury defines "unreasonable" as meaning that the jury have not really performed the duty cast upon them. No doubt FitzGibbon, L.J., in *Quinlane* v. *Murnane* (4) says that "perverse" means that the jury misconducted themselves in coming to the conclusion they did, but I confess I would be rather inclined to put it that they knowingly and deliberately found their verdict, either against the proved facts, or in the face of the law to the contrary, as explained to them by the Judge. To do either might unquestionably be so improper on the part of a jury as to amount to at least constructive misconduct. But I do not see that that amounts to more than saying that the finding is unreasonable and unjust, that it is one which twelve reasonable men could not properly find, in fact that the jury have not done their duty. I therefore think that so far as the case of *O'Brien* v. *Salisbury* (1) is concerned it does not decide that any higher or more rigorous test is to be applied in cases of libel than in other actions of tort. Is there any reason why a higher test should be applied? It is the function of the jury, and of the jury alone, to find "libel" or "no libel." It is likewise their function, and their function alone, to find in other actions assault or no assault, conversion or no

(1) 6 T. L. R. 137.
(2) 1 C. B. 731.
(3) 11 A. C. 152.
(4) 18 L. R. Ir. 53.

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conversion, negligence or no negligence, malice or no malice, and the numerous other issues of fact that arise in actions of tort. In the great majority of cases proper instruction from the Judge as to the legal aspect is essential. The jury give their opinion, and I cannot see why the giving of their opinion, say, on the question of "malice" or "reasonable and probable cause," should stand on a different plane from their opinion on the question of libel or no libel.

But again it is said that so exceptional is the case of libel that only three cases are to be found in the books in which a verdict of "no libel" was disturbed, viz.: *Levi* v. *Milne* (1), *Parmiter* v. *Coupland* (2), and *Hakewell* v. *Ingram* (3). On what ground the new trial was granted in *Parmiter* v. *Coupland* (2) does not appear, but in the other two cases it is clear that the jury miscarried in disregarding the Judge's instructions as to what constituted a libel. In *Hakewell* v. *Ingram* (3), Crowder, J., says:—"In libel, as in other cases, when a jury has miscarried the Court may authorize a new trial, but the Court ought to be slow to interfere in cases of libel, and ought not to grant a new trial unless they see that the jury *have* miscarried."

If then libel is in the same category as to a new trial as other actions of tort, the only question that remains is whether this verdict is so unreasonable and unjust that twelve reasonable men might not find it; in fact, have the jury miscarried altogether? It is plain, as I have already pointed out, that they have miscarried at least in the issues on the plea under the Libel Act of 1888 as to three of the meetings. I must assume that the Judge told them there was not a scintilla of evidence of the accuracy of the reports of these meetings, or of their being public meetings, or of their ever having been held. In the absence of such evidence the jury have found that the reports were accurate; that the meetings were public meetings; that these meetings were held for the lawful discussion of matters of public concern; and that the publications were of matters of public concern and for the public benefit. More amazing findings in relation to what, for all that the evidence discloses, may have been bogus and unreal meetings

(1) 4 Bing. 195. (2) 6 M. & W. 105. (3) 2 C. L. R. 1397.

it is difficult to imagine. If we find the jury so ignorant or unmindful of their duty in one branch of the case, it at least must lessen the weight which Honeyman, J., in *Odger* v. *Mortimer* (1) attached to the verdict of a *special* jury. I have said that I would avoid as far as possible commenting on the facts of this case, but it is necessary for me very shortly to point out what the jury had to consider on the plea of "no libel," and whether there were any circumstances that could legitimately be taken into their consideration in favour of the plea, for I admit at once that, if there was any evidence on which the jury might have acted in finding the verdict they did, we should not interfere. I shall further assume with Grove, J., in *Odger* v. *Mortimer* (1) that, if there is one ground of action with which the Court should hesitate to interfere with a jury more than any other, that ground of action is libel. However we may look at this verdict, the question we have to answer is—were the jury clearly wrong? Now, in the first place we must take it—notwithstanding the argument to the contrary that we have heard from defendants' counsel—that the printing and publishing of matter in which a man is held up to public notice as a "grabber" are *prima facie* actionable. Mr. Justice Gibson would not have left any question to the jury unless the expression was susceptible of a defamatory meaning; and though he did not leave any questions on the innuendoes, it is, I think, not to be doubted that the defamatory meaning of the word is that which is to be found in the 12th paragraph of the statement of claim, and which he must have instructed them was the meaning which they would have to find, if they found that any of the matters charged against defendants were libels. The learned Judge, when evidence was offered of the meaning of the language, considered—and apparently without objection—such evidence to be unnecessary; and it is therefore to my mind clear that we must regard the publications as containing matter which in its ordinary and unqualified sense was *prima facie* a libel. It was for the jury then to say whether in all the circumstances of the case there was anything to put a different colour on the words, and whether the sting was taken out of them to such an extent as to render them

(1) 28 L. T. (N. S.) 472.

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innocuous and strip them of their *prima facie* defamatory character. Familiar examples of cases where the original and defamatory character of the language may be repelled are to be found where the words were shown to have been used as a joke or were understood in a sense that would not be harmful to reputation or would not hold the person up to odium and censure. Mr. Justice Gibson, in reporting that his view did not coincide with that of the jury, suggests that they may have been influenced by the plaintiff's conduct in apparently submitting to the jurisdiction of the United Irish League and in publishing letters of vindication in the defendants' paper. That the plaintiff did both of these things is proved by the evidence, but what does such action show except that finding himself day by day driven by a tyrannous combination to the verge of ruin, he was willing—before appealing to the law of the land which ought to have protected him—to resort to any other expedient which might reinstate him in the favour of those whose enmity he had incurred? How does such conduct on his part in any way qualify or extenuate the *prima facie* meaning of the published matter? Even if it had the effect of eventually conciliating those who were opposed to him, it could not put an innocent or harmless meaning on the language. If the latter *could* be understood as implying that the plaintiff was guilty of harsh and dishonourable conduct and ought to be shunned, the course taken by the plaintiff in no way affected that meaning. Apart from that, I have most carefully gone through the evidence and the documents in the case, and I can find no particle of evidence which could operate on the mind of any reasonable man to bring him to the conclusion that the language complained of could be, or was, understood in any sense save that attributed to it by the plaintiff. Witness after witness deposed to the injurious effect the application of the word "grabber" would have; not a single witness suggested for a moment that it was a harmless expression either in its primary signification or in the circumstances in which it was used. There is no conflicting evidence whatever on this issue of "libel" or "no libel." The evidence is all one way. It is simply this: the defendants' paper published these matters; the publication of them was calculated to hold the plaintiff up to odium and censure and to expose him to public hatred and ill-will,

and to injure him in his business; and as a matter of fact he has been seriously affected in all his business relations. That is the plaintiff's case as proved in evidence, and whatever effect on the damages his course of conduct might have, there is no evidence of any sort in the case which could be suggested as justifying the finding of "no libel." I find it impossible to surmise how the jury could have miscarried to the extent they did. Lord Morris in *Aitken* v. *M'Mechan* (1), in giving the judgment of the Judicial Committee of the Privy Council ordering a new trial, tried to find reasons for the jury's verdict by the suggestion that some of the evidence in the case was calculated to divert the attention of the jury from the real issue; and in *Jones* v. *Spencer* (2) the Lord Chancellor—reversing the Court of Appeal and ordering a new trial—remarked that he thought the jury had not thoroughly appreciated the question before them. It is enough for us, without imputing anything corrupt or dishonest to the jury in the present case, to say that whether by reason of their attention being diverted from the real issue or of not thoroughly appreciating the question before them or from some element of confusion having entered into the case, they have returned a verdict which, in our opinion, is one that twelve reasonable men could not find, and which amounts to a miscarriage of justice.

The verdict for the defendants will therefore be set aside, and a new trial ordered.

The costs of this motion will abide the event of the new trial.

BARTON, J.:—

I concur, but on different grounds. It is enough for me to say that I am satisfied that the jury did not understand the meaning of the issue of "libel or no libel." I express no opinion as to whether a finding of "no libel" ought, under the circumstances of this case, to be set aside as against the weight of evidence, which I understand to be the ground of the decision of the other members of the Court. If I thought that we had in this case on the record a clear and consistent finding of "no libel," I would have to consider that serious question; but I rest my judgment exclusively on the ground that, when they are looked at in the light of the evidence,

(1) [1895] A. C. 310. (2) 14 T. L. R. 41.

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of the course of the trial, and of the learned Judge's report, the answers of the jury are not consistent with each other, or with a due appreciation by them of the relation of the various questions to each other, and indicate that the jury did not understand the meaning of the issue of "libel or no libel," and the relation to it of the defences under the Law of Libel Amendment Act, 1888. I may refer to a recent case of *Jones* v. *Spencer* (1), in which the Lord Chancellor, in delivering the judgment of the House of Lords, directing a new trial, said that "he did not propose to enter into the evidence, because, according to the long-established rule, when the verdict of a jury was set aside, no observations as to the effect of the evidence should be made lest they might prejudice the new trial. *It was sufficient to say that he did not think that the jury in this case had thoroughly appreciated the question before them.*"

In the first place, it seems to me that if the jury had thoroughly understood the meaning of the issue of "libel or no libel," they would hardly in this case have answered all the questions 3 to 7 after finding that none of these publications were libels. When a jury finds "no libel" in favour of a defendant, there is usually an end of the case; and, in the ordinary run of cases, it is unnecessary for the jury, after finding that there has been "no libel," to answer questions of privilege or excuse, which only arise if they are of opinion that the writing is *prima facie* a libel. A finding of fair comment stands on a somewhat different footing, because that which is a fair comment is not a libel at all, and one finding may explain the other. In libel cases, as in other cases, it is often useful and convenient to take alternative findings from the jury; but in a case like the present a finding of "no libel" seems to be inconsistent with, or at all events to render unnecessary, findings of privilege or excuse at common law or by statute, which proceed on the hypothesis that the writing in question is *prima facie* a libel if not privileged or excused. If the defendants at the trial had put forward alternative defences of "no libel" and "privileged libel," it would be more easy to suppose that the jury meant these findings for alternative findings to that effect. But I am under the impression that the defendants never seriously put forward the defence of

(1) 14 L. T. R. 41.

"no libel" as regards the majority of these publications. On the other hand, these various findings can be reconciled with the course of the trial and with each other by the simple explanation that the jury did not understand the meaning of the finding of "no libel," and thought that it was equivalent to a general finding for defendants, and meant that these publications, or some of them, were *prima facie* libels, but were excused or privileged by reason of the Act of 1888. If this was their meaning, it is clear that there must be a new trial.

The course of the correspondence and of the trial supports the view that this was what the jury had in their minds, because it appears, both from the letter written before the action and from the evidence at the trial, that the main line of the defence, in respect of the seven reports of meetings, was not that the reports of these seven meetings were "no libels," but that they came within the provisions of the Act of 1888.

The learned Judge reports that he put these questions, Nos. 3 to 7, in order to avoid the necessity of a new trial. We are all agreed that in the present case they cannot have that effect. Indeed, I think that in a libel case it is usually in the event of a finding for the plaintiff on the issue of "libel or no libel" that the answers to such questions are calculated to avert a new trial. In the present case it seems probable that it was from this point of view, *i.e.* in contemplation of a probable finding by the jury that these publications or some of them were libels, that the learned Judge expected, by putting these questions, to avert the necessity of a new trial. The defendants do not appear to have, either before or at the trial, ever seriously made the case that none of these publications were *prima facie* libellous, and the Judge probably did not contemplate the unlikely contingency that the jury might find "no libel"—a defence which the defendants themselves had not seriously put forward.

Mr. Redmond Barry suggested that the jury, by their answers to these alternative questions, meant to say that, even if these publications were *prima facie* libels, they were excused or privileged under the Act of 1888. In some cases this suggestion might afford an adequate explanation; but it seems to me, from the course of the correspondence and of the trial and from the learned Judge's report, that this was not what the learned Judge meant the jury

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to understand when he put the questions, and was not what the jury had in their minds when answering them.

These considerations lead me to the conclusion that *the jury did not thoroughly appreciate the questions before them*; and that being so, I am of opinion that the case should be sent to a new trial. I am glad that this view of the case makes it unnecessary for me to make any comment on the facts.

Wright, J.:—

This is an application on behalf of the plaintiff to set aside a verdict found for the defendants and for a new trial. The action, which was one of libel, was tried at last Trinity Sittings, before Mr. Justice Gibson and a special jury of the city of Dublin, and resulted in a verdict for the defendants, the jury finding in favour of the defendants on all the issues submitted to them.

The present application to set aside the verdict is mainly rested on the ground that the verdict is against the evidence and the weight of evidence. That evidence it becomes necessary for me shortly to review.

The alleged libels and the evidence generally were conversant with the taking by the plaintiff of a farm in the county of Clare, once in the occupation of John and Margaret Flanagan, as tenants to Mr. Wilson Fitzgerald. The Flanagans held, as appears from the evidence, three farms, including the farm in question. As to this latter, there would appear to have been constant disputes, as a result of which the rent fell into arrear, and in August or September, 1900, the Flanagans voluntarily surrendered it to the landlord, in whose hands it remained for some months. In December, 1900, plaintiff, who was in business in Ennistymon for twenty years as shopkeeper, and also for twelve years as an auctioneer, entered into an agreement with Mr. O'Brien, agent for the landlord, to become tenant of the farm at the yearly rent of £50, and in pursuance of this agreement possession of the farm was given to the plaintiff on the 4th of January, 1901. Plaintiff appears to have been in undisturbed possession of the farm without trouble or annoyance of any kind from the Flanagans or anyone else down to the month of September, 1901. On the 29th of that month a public meeting was held in Ennistymon, not far from plaintiff's house, at which reference was made to his action in

taking the farm by a speaker named Tim Flanagan, who tried to propose a resolution on the subject, but was prevented by the chairman, and following this, Flanagan wrote to the editor of the *Clareman* the letter of the 3rd of October, which was published in the next issue of the *Clareman*, and is the first of the alleged libels. That letter is in the following terms:—[His Lordship read the letter, at p. 349, *ante*].

This letter was followed by a number of meetings of branches of the United Irish League at Ennistymon, Corofin, Kilshanny, and Inagh, the three latter places within four to twelve miles of Ennistymon, all in the county of Clare, at all of which allusions are made to the taking by the plaintiff, "grabbing" as it is termed, of this farm. The proceedings at all these meetings are published in the defendants' paper, and of these reports the plaintiff complains as libels on him, which have done him serious injury.

The next publication complained of is in the issue of 2nd November, which purports to report the proceedings of a meeting of the Corofin Branch of the United Irish League, at which "it was unanimously resolved that the grabbing of Messrs. Flanagan's farm by Mr. M'Inerney, auctioneer, Ennistymon, be condemned in the strongest manner possible, and that intimation of same be sent to the Ennistymon Branch of the League, Messrs. Flanagan being members of this branch." Such intimation appears to have been sent, and in the issue of the 16th November a report is published of the proceedings of a meeting, held in Ennistymon, of the Ennistymon Branch of the United Irish League. The report is as follows:—[His Lordship read the report, at p. 349, *ante*].

The next meeting was a meeting held at Corofin on the 17th November of the Corofin Branch of the United Irish League, the proceedings at which are reported in the *Clareman* of the 23rd November.

The next report complained of as a libel is contained in the defendants' issue of the 14th December, and purports to be a report of the proceedings of a meeting held in Ennistymon by members of the local branch of the United Irish League.

Then comes the issue of the 21st December, 1901. "Corofin Branch United Irish League. Flanagan-M'Inerney Grabbing

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Case." On 22nd December a meeting was held at Inagh of the Inagh Branch of the United Irish League, and the *Clareman* in its issue of the 28th December purports to report the proceedings thereat:—"A resolution proposed by J. Henry, seconded by Mr. J. Longe, endorsing the resolution from Corofin Branch condemning M'Inerney, the Ennistymon grabber, was passed unanimously"; and the defendants' paper of the 4th of January purports to publish a report of the proceedings of the Inagh Branch of the United Irish League disapproving of the action of Mr. John M'Inerney, auctioneer, in overholding, in direct violation of his promise, this farm possessed by the Flanagans for half a century. The next and last publication in defendants' paper complained of as a libel on plaintiff is that published in their paper of the 25th January, 1902, and headed "Wholesale Shooting at Kilshanny," and is as follows:—[His Lordship read the publication, at p. 335, *ante*].

The libels, or alleged libels, are therefore nine in number, published in several issues of the defendants' newspaper the *Clareman*. One of them is the letter of T. Flanagan, dated 3rd October, published by defendants in their paper of the 5th October. Seven of them are reports, or what purport to be reports, of meetings of local branches of the United Irish League, and the 9th is the paragraph headed "Wholesale Shooting at Kilshanny." The statement of claim sets out these nine publications in separate paragraphs without any innuendo, and further (paragraph 12 of the statement of claim) puts on them the innuendo that the plaintiff was guilty of harsh, dishonest, and dishonourable conduct in becoming tenant to the farm formerly occupied by the Flanagans, that he was a person to be shunned, and that persons should have no dealings with him as an auctioneer or farmer.

The statement of defence traverses the publication of the several alleged libels, pleads "no libel," that the several articles were fair comments upon matters of public interest, and also a plea under the Newspaper Libel Act of 1888.

At the close of the trial, which lasted two days, questions on the several defences were submitted to the jury, and all were answered in favour of the defendants. Plaintiff's counsel asked for a direction on the defences in the nature of fair comment, and

that relying on the Newspaper Libel Act, 1888, sect. 4; but the learned Judge, as he informs us in his report, thought it better to take the opinion of the jury on them, although he would appear to have been of opinion that these defences had not been made out. The main and primary finding, however, is that these publications were not libels, or a libel; and unless we are of opinion that this finding of no libel is wrong, and so wrong, according to the established principles of Courts of Law in reviewing and interfering with findings of juries on questions of fact, that we can set it aside, it would not be open to us *usefully* to consider the findings on these other issues, fair comment and defence under Newspaper Libel Act of 1888. The principles upon which Courts of Law have acted, and are in the habit of acting, in setting aside verdicts of juries on the ground that they are against the weight of evidence are well settled. A verdict of a jury ought not to be disturbed unless (in the language of Lord Herschell in *The Metropolitan Railway Co.* v. *Wright* (1)) it was one which a jury, viewing the whole of the evidence reasonably, could not properly find, affirming the principle laid down in *Solomon* v. *Bitton* (2) as corrected in *Webster* v. *Friedeberg* (3). The same principle has been applied in two later reported cases, *Jones* v. *Spencer* (4), and in *Aitkin* v. *M'Mechan* (5), where the Privy Council set aside a verdict of a jury in a testamentary case, Lord Morris, in delivering the judgment of their Lordships, saying (p. 317) that the verdict was contrary to the evidence to such an extent as to call for a new trial. This principle has not been contested in argument, but the contention of defendants' counsel is that it has no application to the issue of libel or no libel, that this question is always for the jury, and their finding on it cannot be touched by a Court unless it is perverse or dishonest, and reliance is placed upon the language used by Mr. Justice Field in refusing a like motion in *O'Brien* v. *Lord Salisbury* (6).

Since Fox's Libel Act, 1792, which left to the jury in criminal cases the question of libel or no libel, by analogy to it this question in civil actions of libel has always been for the jury, and, as I

(1) 11 A. C. 152.
(2) 8 Q. B. D. 176.
(3) 17 Q. B. D. 737.
(4) 14 T. L. R. 41.
(5) [1895] A. C. 310.
(6) 6 T. L. R. 137.

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understand, it is usual and proper for a Judge presiding over a trial at Nisi Prius of a civil action of libel to decide whether the words, written or spoken, are capable of bearing a defamatory meaning, and if, in his judgment they are not so capable, to withdraw the case from the jury; if, in his opinion, they are capable of bearing the defamatory sense, then it is for the jury to say whether, under the circumstances proved in the case, the words written or spoken are defamatory or not. It is, and always must be, a jury question; but the contention that the finding of a jury in a libel case differs from the finding of a jury in any other action of tort in this essential, that the Court has no power to interfere with it and set it aside unless where it is shown to be perverse or corrupt, has not, in my opinion, been made out. Verdicts in such cases have been set aside, and though the reported cases are few, they seem to me, when examined, to proceed on the general principle which I have already stated as applicable to other actions. I shall shortly examine these cases. In *Levi* v. *Milne* (1), which was the case of a libel on a bailiff, the verdict was set aside, but there the jury clearly misconducted themselves, and found a verdict against the plaintiff, so as to avoid giving costs against the defendant. I do not, therefore, think it can be relied on as an authority for either party, plaintiff or defendant. In *Broome* v. *Gosden* (2) the verdict was upheld, and on reading the alleged libel, and the evidence as reported, it was rightly upheld, the Court (see particularly the judgment of Tindal, C. J.) pointing out that the alleged libel bore rather the meaning of a chance occurrence than implied that the plaintiff kept a house in which misconduct habitually occurred and outrages were committed, which was the meaning put on it. The Chief Justice puts it upon this ground:—"The only question in this case is whether we can see that the jury have done manifestly wrong in not finding the alleged libel to bear the meaning that the plaintiff has thought fit to put upon it by the innuendo." The Chief Justice then reads the libel, and says:—"The innuendo takes a much wider range and extent than the words of the libel fairly warrant, turning that, which may have been an accidental

(1) 4 Bing. 195. (2) 1 C. B. 731.

occurrence, into habitual misconduct and negligence on the part of the keeper of the house. I see no sufficient reason for finding fault with the conclusion at which the jury have come." And, on the ground that the Court could not see that the jury had done manifestly wrong, the Court refused the application to set aside the verdict. In *Hakewell* v. *Ingram* (1) the verdict for the defendant in an action of libel was set aside by the majority of the Court, Maule, J., *dissentiente*. Chief Justice Jervis says:—"There is no doubt that the Judge may give to the jury, and they are bound to take, his definition of a libel, and that if a paper be calculated to bring the plaintiff into disrepute, or hold him up to ridicule, that will constitute a libel; and the jury have no right in the determination of the question to enter into any other matters which do not arise upon the issues. The true effect of the statute was this: before the statute it was the habit of the Judges to state their opinion whether the paper was a libel, as a matter of law, and confine the jury to a question of publication. And the statute said that the case of libel shall be like any other case of criminal proceeding, the Judge defining the law, and the jury having a right to determine, by a general verdict, upon the whole question, guilty or not guilty. Although the Act is confined in its terms to criminal proceedings, yet, as Lord Chief Justice Best stated in the case cited:—'It is in principle a practice applicable to civil cases.' In *Parmiter* v. *Coupland* (2) Parke, B., points out that; and though in criminal proceedings for libel there may be no review, in civil matters there are cases in which verdicts for the defendant are set aside upon the ground that the matter was a libel, though the jury found it was not. A case was referred to in which that course was taken, and there is no technical rule to prevent us from applying the ordinary practice of reviewing the decision of the jury when they have come to a wrong conclusion." A new trial was ordered, and the result was a verdict for one farthing. *Parmiter* v. *Coupland* (2) was an action for a series of libels published of the plaintiff, who was Mayor of the borough of Winchester, in the *Hampshire Advertiser* newspaper, imputing to him partial and corrupt conduct and

(1) 2 C. L. R. 1397. (2) 6 M. & W. 105.

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ignorance of his duties as Mayor and Justice of the borough. The defendants at the trial pleaded not guilty, and the jury found a verdict for the defendants. An application was made to set aside the verdict on the ground of misdirection under two separate heads. Both were refused by the Court, Baron Parke saying:—"The verdict is unquestionably wrong, and there ought to be a new trial, but on the ground of its being a wrong verdict only." And accordingly it will be found that the rule was refused on the ground of misdirection, but was granted upon the ground taken by the Court that the verdict was a wrong verdict, and the rule was made absolute on the payment of costs. In *Odger* v. *Mortimer* (1) an application to set aside a verdict found for defendant in an action of libel on the ground that it was against the weight of evidence was refused, the Court holding that it was for the jury to say whether the article complained of was a personal attack on the character and motives of the plaintiff or on the political principles which, as a public man, he professed. This brings me down to the case of *O'Brien* v. *Lord Salisbury* (2), so much discussed during the argument before us, in particular the passage from the judgment of Mr. Justice Field at p. 137, where he lays down that a verdict in an action of libel cannot be set aside unless it is either so perverse or so unreasonable as to show that the jury cannot honestly have taken all the facts into their consideration, and it is argued for defendants that we cannot touch this verdict, unless we find it was either perverse or corrupt.

This is, in my opinion, pushing too far the language used in this last cited case, and I think the same conclusion would have been arrived at if, for the word "honestly," you were to read the word "reasonably." Mr. Justice Field does not say that a higher standard is to be applied to the cases of libel than to other cases. Here we have the plaintiff described as an "auctioneer who has made himself very notorious of late." What is the effect on the minds of the community in which the man lives, I care not who he is, be he great or small, of holding him out to the public as a "grabber" and "a person who has made himself notorious of late"? The articles, nine in number, cover a period of about four months;

(1) 28 L. T. (N. S.) 472. (2) 6 T. L. R. 137.

in all of them plaintiff is styled a "grabber." "The glaring case of landgrabbing," "I will continue to denounce the grabber until justice is done to his victim," "M'Inerney, the Ennistymon grabber," are some of the expressions used. That the plaintiff was the subject of these articles and attacks was not questioned, nor did any witness, whether for the plaintiff or defendant, venture to deny the injurious effect of calling a man a "grabber." "Calling a man a grabber is a serious thing for a farmer or business man," according to Mr. O'Brien the agent, who was examined for the plaintiff. The Rev. J. F. Fitzgerald, a witness for the defendants, says that expression (that he grabbed the farm) would mean that he got it unfairly, and again, "It would do him harm to call him a grabber." Galvin, the editor of defendants' newspaper, examined for defendants, said, "I would not have a kindly feeling to a grabber," but apart from all evidence in the case, and applying to it one's own knowledge and experience of affairs in Ireland, what was meant under the existing circumstances of for four months opening the columns of a local paper to denunciations of this man for "grabbing," as it is termed, a farm which the late tenant had voluntarily surrendered to the landlord? To ask the question is to answer it. He is denounced at meetings of four local branches—Inagh, Kilshanny, Corofin, Ennistymon—and last of all comes the paragraph contributed by a correspondent named Griffin, headed "Wholesale Shooting at Kilshanny," the contents of which are, according to the evidence of District Inspector Irwin, grossly exaggerated, if not inventions. In my opinion the verdict of the jury that these publications, nine in number, were not libellous was a verdict which no jury could have found as reasonable men.

Reliance was placed by defendants' counsel on the case of *Mawe* v. *Pigott* (1), and it was argued on the authority of that case that to make words libellous the imputation must be one tending to bring the plaintiff into hatred, ridicule, or contempt with a society whose standard of opinion the Court can recognise, and that all right-minded men might think nothing the worse of plaintiff. It was a case decided by the Court of Common Pleas in

(1) I. R. 4 C. L. 54.

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this country, and I am far from holding the opinion that it was wrongly decided. But it was decided on demurrer when the facts were not ascertained and no evidence given. The parties were then bound by the facts as they were disclosed in the pleadings before the Court. The head-note is:—"On demurrer to a declaration in libel the Court will not construe words complained of *mitiori sensu*, but will see if there be anything which by reasonable intendment conveys an imputation. To make words libellous, the imputation must be one tending to bring the plaintiff into hatred, ridicule, or contempt, with a society whose standard of opinion the Court can recognise." And Mr. Justice Lawson, in giving the judgment of the Court, uses the following language:—"Mr. Heron, however, argued that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose a person to great odium to represent him as an informer, or a prosecutor, or otherwise aiding in the detection of crime; that is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally, and thinking that the language, even when explained by the innuendoes, is not calculated to lower the plaintiff in that estimation and that it does not convey any imputation upon his character, we must allow this demurrer." The case of *Mawe* v. *Pigott* (1) is referred to in a note to Starkie on Slander (ed. 1891), at page 171, as follows:—"It has been held by the Court of Common Pleas in Ireland that to make words libellous, the imputation must be one tending to bring the plaintiff into hatred, ridicule, or contempt with society whose standard of opinion the Court can recognise." That is the only passage in which, either in text-book, or in decision, that case has ever been referred to. I cannot say that it would appear to be cited with approbation, but be that as it may, I do not think it has any application to the present case.

It was also objected by the defendants' counsel that the innuendo had not been left to the jury, that it was for the plaintiff seeking

(1) I. R. 4 C. L. 54.

a verdict to have got a finding on this, and that he must now suffer for this omission.

It seems to me to be quite clear that the learned Judge at the trial adopted, without objection from counsel on either side, the course which he took in *Fisher* v. *Rooney* (1), and which was declared by Holmes, L.J., in delivering the judgment of the Court of Appeal, to be proper and in accordance with law. I refer very shortly to the learned Judge's report, which is given at p. 470:—"As to the innuendoes, before commencing my charge, I suggested that they only tended to embarrass the jury, and that any question as to them should be struck out. Plaintiff's counsel assented to this; but, as defendants' counsel did not agree, I let the question stand. The English and Irish pleading rules are the same, and it being settled in England that innuendoes are severable from the libel, I directed verdict and judgment for the plaintiff." The jury found that the innuendoes were too strong, but they did find that the words were a libel, and assessed damages at £50, and the Judge gave judgment accordingly. At page 485 Lord Justice Holmes, delivering the unanimous judgment of the Court, says:—"It is to be further observed that the course taken by Mr. Justice Gibson would, admittedly, have been the proper and legal course in England, and that it is not unusual in this country. I have it from Mr. Justice Gibson himself that during his twelve years of judicial experience he has always acted, without objection, on the view that the innuendoes are severable from the libel. I have acted on the same view during the ten years in which I was engaged in trying jury cases, and I think I could name other Judges who have done so." This objection accordingly fails. In truth both parties at the trial and the Judge thought that the articles carried their own meaning and required no innuendoes, and accordingly it was thought sufficient to leave it to the jury to say whether these articles, *prima facie* libellous, were so under the circumstances proved in evidence.

It remains only to consider the pleas of fair comment and the defence under the Newspaper Libel Act of 1888. The first of these pleas does not cover the whole cause of action; in fact it only

(1) [1901] 2 I. R. 465.

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applies to a very trifling, almost an insignificant portion of it, *i.e.* to the libels so far as they are expressions of opinion (*vide* paragraph 7 of statement of defence). But apart from this objection, I hold that the plea fails upon a more substantial ground, namely, that the matter under discussion—the circumstances under which the plaintiff took the farm in question—could not in any reasonable sense of the words be deemed to be a matter of public interest and importance: *Henwood* v. *Harrison* (1).

Lastly, as to the eighth plea, that the words in paragraphs 4 to 11 were "fair and accurate reports, or were parts of fair and accurate reports of the proceedings of public meetings, which were held at places and times appearing by reference to the said reports respectively; the matters were in each case of public concern and their publication was for the public benefit." Sect. 2 of the Newspaper Libel Act, 1881, has been repealed by the later Act, and section 4 of the Act of 1888 gives a wider protection to newspapers than was given by the former Act; and, without stopping to examine the section minutely, its general effect may be stated to be to protect fair and accurate reports of the proceedings of a public meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern. A number of such meetings are specified in the section. The object of the section is a public object, viz. to give protection to the report, when the meeting is in the genuine sense a public meeting, and when it is for the public benefit that the public should read what occurred at it. Applying that to the facts of the present case, we have here reports of the proceedings of meetings, generally held within closed doors, of a local branch of a body called the United Irish League from which invariably the police and, in most instances, the parties interested are excluded. At a great number of the meetings no reporter was present, and I may point out that, so far as the evidence before the Court goes, there is no proof that a meeting at all took place, with the exception of one or two meetings deposed to by Father Fitzgerald. As to all the other alleged meetings, it is possible that no meetings at all were held, but assuming, as I do, that such meetings were held, the purpose

(1) L. R. 7 C. P. 606.

of each one of them was to denounce a local trader for doing a perfectly lawful act. It would be a degradation of the English language to say that the section could apply to such a state of things—to meetings within closed doors from which the authorities are excluded, and convened for such a purpose.

The findings of the jury on these latter questions, Nos. 3 to 7, are so utterly at variance with the truth, so startling and fantastic, that they of themselves throw the utmost discredit on the finding on the first and main question of libel or no libel.

For these reasons, agreeing with my brethren, I am of opinion that the verdict must be set aside and a new trial ordered.

J. L.

The defendants appealed (1).

Sullivan, K.C., Redmond Barry, K. C., and *E. J. Phelps*, for the appellants.

O'Shaughnessy, K.C., Gordon, K. C., and *W. F. Kenny*, for the respondents.

FITZ GIBBON, L. J.:—

This is an action for libel, in which the plaintiff, an Enniskillen auctioneer shopkeeper and farmer, complains of eight publications which appeared in different numbers of *The Clareman*, a weekly newspaper owned and published by the defendants, and circulating in Clare. Each of these publications is stated without innuendo in a separate paragraph of the statement of claim as a distinct cause of action; these paragraphs are numbered 3 to 11 inclusive, and are followed by paragraph 12, which complains of the same eight publications, attributing to each of them the meaning "that the plaintiff was guilty of harsh dishonest and dishonourable conduct in becoming tenant of a farm formerly occupied by certain persons named Flanagan, and that he was a person to be shunned, and that persons should have no dealings

(1) In the Court of Appeal before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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with him as an auctioneer or farmer." The statement of claim concludes with an allegation of consequential damage to the plaintiff's business credit and good name.

In addition to traverses, the defendants pleaded two defences to the causes of action alleged in paragraphs 3 to 12 inclusive. 1. "No libel." 2. That the words complained of were articles and parts of articles communications and reports, published by the defendants in the ordinary course of their business as public journalists, relating to matters of public interest, concerning which the plaintiff himself addressed communications to the public Press, which were published in the defendants newspaper, and that the said words and all of them, so far as they were expressions of opinion, were fair and *bona fide* comments made in good faith and without malice upon matters of public interest.

This second defence is, in my opinion, to be regarded as a special plea of privilege; it is described in the Judge's report as a "plea of fair comment."

There is a third defence based on the Newspaper Libel Act, 1888. [The Lord Justice read the plea, *ante*, p. 355.]

Upon these pleadings issue was joined, and the case was tried by a Dublin city special jury before Gibson, J. at Trinity Sittings, 1902. At the close of the case counsel for the plaintiff asked for a direction upon the special defences; but although the Judge "was inclined to think that, if and so far as the publications were libels, the plea of fair comment" (which he describes as "only relating to a trifling part of the action"—an observation which, having regard to the defence being pleaded in bar to paragraphs 4 to 10, I cannot follow) "was not established"; and although he was of opinion that the defence founded on the Newspaper Libel Act, 1888, "was not made out," he reports that "to avoid the necessity for a new trial he left the issues of fact to the jury, explaining what was necessary to be proved to support the defences."

The questions so left, and the findings, were as follows:— [The Lord Justice read the issues, *ante*, p. 356].

Upon these findings the jury found for the defendants by direction of the Judge, who gave judgment for the defendants with costs, but stayed execution to enable the plaintiff to move

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for a new trial, which he afterwards did on the grounds that the verdict was against evidence and the weight of evidence, and that there was no evidence given by the defendants in support of the finding of no libel, and that the Judge should have directed for the plaintiff on the defences 6, 7, and 8, viz. the pleas of "no libel," "fair comment," and the Newspaper Libel Act. As to the plea of "no libel," this requisition for a direction cannot be sustained.

The motion was heard in the King's Bench by Kenny, Barton, and Wright, JJ., who unanimously, but Barton, J. "on different grounds," set aside the verdict, and gave a new trial.

From this order the defendants have appealed. The appeal raises the important delicate and general question of setting aside the finding by a jury of no libel. It also necessitates the consideration of important questions upon the applicability of the plea of privilege, and of the plea founded upon the Newspaper Libel Act, to the facts proved at the trial. It is impossible to discuss any of these questions without reference to the evidence, and it is difficult to conduct such a discussion upon a new trial motion without touching upon matters which our Constitution has placed under the exclusive jurisdiction of the jury. I shall do my best to avoid prejudicing the future trial by the final tribunal of any issue which it is beyond my province to decide; but I must state the grounds of the conclusion at which I have arrived, and I must also explain and express my opinion upon the objections to the verdict, and make such observations as may be necessary or useful for the guidance of the Judge at a second trial.

To make the case intelligible, I must summarize its incidents in order of date, and it is most necessary to observe the sequence of events, which was not made clear in the opening of the appeal, and which seems, in my opinion, to have been overlooked by Gibson, J. in his observations upon the finding of "no libel."

On January 4, 1901, the plaintiff got possession from the landlord of 300 acres of rough land at the rent of £50, which Margaret Flanagan and one of her brothers had surrendered in August or September, 1900, being then liable to arrears, amounting to £170 or £180, of the rent of £65 at which they had held it in equal shares. It was offered to one of the Flanagans at a rent of £50; he offered £45, but the landlord did not accept

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the offer, and the land remained untenanted until it was let to the plaintiff. No objection was made by any of the Flanagans to the transaction with the plaintiff, and there was no annoyance or claim from any of them, until a public meeting was held in Ennistymon on September 29, 1901. So long as the law remains the same for dealings with land as with other property, this letting to the plaintiff, and his possession of this farm, must be regarded in a Court of Justice as matters of private concern affecting no one but the parties to a lawful transaction. The Rev. Mr. FitzGerald, Roman Catholic Curate of Ennistymon, presided at the meeting on September 29, which was held to encourage the United Irish League recently established there. As the meeting was about to disperse, Timothy Flanagan, a brother of Margaret, came on the platform, and said that a certain "grabber" should be denounced. The Rev. Chairman, to use his own words, "shut him up and protested against his observations."

The next incident in the case is the publication on October 5, in the next issue of the defendants paper, of the first document complained of—a letter from Timothy Flanagan explaining his position as regards the incident at the meeting; stating that he expected up to the last moment that "the glaring case of land-grabbing" to which he referred would be alluded to by some of the speakers; apologizing for his unintentional omission to obtain the Rev. Chairman's consent to speak; and concluding with these words—"At the same time I repeat that I only considered it my duty to do as I did, and that I will continue to denounce the grabber until justice is done to his victims." The publication of this letter in the defendants newspaper was the commencement and origin of all that followed, and is the cause of action alleged in paragraph 3 of the statement of claim.

Assuming these words to refer to the plaintiff, they are *prima facie* defamatory, as tending to expose him to public odium among his neighbours. No privilege existed, and no justification is pleaded, and the publication therefore *prima facie* imports malice, and the Judge would have been justified in telling the jury that upon the evidence it was their duty to find it to be a libel. But he could not direct them so to find, nor could he withdraw the question from them.

The second publication complained of is the report in *The Clareman* of November 2 of a League meeting held at Corofin on the previous Sunday, at which it was unanimously resolved "that the grabbing of Messrs. Flanagans farm by Mr. M'Inerney, auctioneer, Ennistymon, be condemned in the strongest manner possible; and that intimation of same be sent to the Ennistymon Branch of the League, Messrs. Flanagan being members of the branch."

It is suggested for the plaintiff that the defendants ought to have given evidence that each of these meetings was held, and that the reports were in fact accurate. Such evidence was given as to some, but not all, of the meetings. But I regard this point as immaterial, because the whole course of the trial proceeded on the assumption, and in fact the gist of the action was, that the meetings were held as reported, and that the damage to the plaintiff was caused by the publication of what occurred at them.

Next appeared in *The Clareman* of November 16 a report of "a most enthusiastic and representative meeting" of the Ennistymon Branch, at which a letter from the Corofin Branch *re* the Flanagan–M'Inerney case was read, to the effect that the case was again to be considered before a special meeting of the branch to be held on the 17th November, "when full particulars would be sent to the Ennistymon Branch."

The next number of *The Clareman* of November 23 reported "an enormous attendance" at the meeting of the Corofin Branch on the 17th, and that a letter was read from the Ennistymon Branch in reference to the "grabbing" of the Flanagans farm, by M'Inerney, of which notice had been given to the Flanagans, who now appeared to deny the truth of the allegations made or reported to be made by M'Inerney that they got compensation from him amounting to the buying of their interest or goodwill. This was supplemented by Timothy Flanagan handing in a written statement referring, "for the information of the friends of M'Inerney who, through the false reports before alluded to, were in doubts as to whether or not it was a grabbing case," to sales of meadowing belonging to another person having been entrusted to M'Inerney, who issued posters withholding his own name as auctioneer, and when he came on the lands to auction

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same a large crowd of would-be purchasers were there, but on seeing who the auctioneer was, a few made purchases only to throw them up again, and the sale proved abortive until another auctioneer resold on issuing fresh advertisements and posters."

The publication concludes with the following report of words spoken at the meeting:—Mr. Griffey—"It is a simple case of grabbing, and I propose that the branch condemn same in the strongest manner possible, and call upon all the outside branches to do their duty in the matter." Mr. Parnell Roche:—"I second that; if this grabbing is countenanced we won't be there at all." The resolution was unanimously adopted.

That these publications were *prima facie* defamatory does not admit of reasonable doubt.

Until after this publication the plaintiff does not appear to have taken any action, but prior to December 1 he went to the Reverend Mr. FitzGerald and complained of his position, saying that he would write to the landlord and agent who would prove that he lawfully took possession of the farm. He came again with letters from the landlord and agent, saying that the impression was that he had "grabbed" the farm, which expession (occurring frequently in these publications) the clergyman interpreted to mean "that he got it unfairly."

He offered to attend before the Ennistymon Branch and clear himself of the charges, and said that, if the members would listen to him, he had documents which proved the lawfulness of his getting and retaining the lands. This was the commencement of a course of conduct on the plaintiff's part upon which the defendants have relied, and as to which I find the following observation in the report of Gibson, J.:—"As to the finding of no libel (a jury question), the jury may have been influenced by the plaintiff's conduct in apparently submitting to the jurisdiction of the League, and publishing, as he afterwards did, letters of vindication in the defendants paper, but, as far as regards the letter and the reports of meetings, my view did not coincide with that taken by the jury."

Upon this observation, even if it stood alone, in my opinion the verdict cannot stand. The conduct of a plaintiff may be considered by a jury upon the question of damages, but upon the

question of "libel or no libel," conduct of the plaintiff subsequent to the publication could not legitimately influence, as the Judge here reports it may have done, the finding of "no libel." The plaintiff's conduct here, if it evidenced anything, evidenced the injurious character and effects of the publication of Flanagan's letter, and of the proceedings of the League meetings at which the plaintiff was condemned. Assuming these publications to be otherwise defamatory, it would be as unreasonable to find them to be "no libels" because of the subsequent conduct of the plaintiff in trying to stop or remedy the mischief which they did, as it would be to relieve from responsibility a man who unlawfully set his neighbour's heather on fire, because the owner voluntarily jumped into the fire and tried to stamp it out.

The next publication appeared in *The Clareman* of December 14. It is headed:—"Ennistymon United Irish League. The Flanagan and M'Inerney Case. Decision of the Committee." It reports the proceedings at a meeting of the Ennistymon United Irish League at which the "case" was investigated by a committee. The meeting was described as "the most important yet held," and as attended by "a throng of people" which evidenced "the deep local interest taken in its working." Mr. M'Inerney and the Flanagans were in attendance in the League room up to the time the place was cleared for the committee to discuss the matter, but the plaintiff seems then to have withdrawn on the ground that Margaret Flanagan had failed to attend, and a communication was handed in from him respectfully refusing to go into his defence, but stating that he would have the case reheard (if necessity demanded) by "a representative tribunal," by which he referred to another "branch," an "executive authority" of the League. But he afterwards refused to go further in that direction, and he brought this action instead.

The next publication is a report on December 21 of another meeting of the Corofin Branch, and of a discussion by the committee of the resolution previously passed and forwarded to other branches regarding "the Flanagan-M'Inerney grabbing case."

The next number of *The Clareman*, of December 28, published a resolution unanimously passed by a meeting of the Inagh Branch, "condemning M'Inerney, the Ennistymon grabber."

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The last report complained of appeared in *The Clareman* of January 4, 1902. It reports the following resolution of "a well-attended meeting" of the Kilshanny Branch. [The Lord Justice read the report, *ante*, p. 355.]

I first consider this series of reports with reference to the two special pleas.

In my opinion no privilege for these publications is known to our law. The subject-matter, so far as it related to the taking of the farm, was not a matter of public interest, and the publication of the letter and resolutions condemning the plaintiff was not for the public benefit. The meetings at which the resolutions were passed were not within the terms, scope, or protection of the Newspaper Libel Act, 1888. Journalists, in my opinion, publish such things at the peril of legal liability, if they are defamatory of any individual, and cannot be justified as true in fact. It was, in my opinion, the duty of the Judge to withdraw the pleas of privilege and of statutory protection from the consideration of the jury, and to direct them to consider the plea of no libel without reference to any other defence.

I have already quoted the observation of Gibson, J. that the jury *may* have been influenced upon the finding of "no libel" by the conduct of the plaintiff. From the report of the trial, and the findings in favour of the defendants on every issue upon the special defences, some at least of which have no evidence whatever to sustain them, I am forced to the conclusion that the jury *must* have been influenced upon the finding of "no libel" by considerations relating to questions upon the special defences which ought not to have been submitted to them at all, or, if submitted for the purpose of avoiding any risk of a new trial, ought to have been reserved until after the issue of "libel or no libel" had been separately considered and independently decided. Then, but not until then, the Judge might perhaps in his discretion have taken provisional findings upon the questions of fact arising upon the special defences, but that was not the course taken. The Judge reports that he left these issues to the jury "explaining what was necessary to be proved to support the defences," "summarizing the evidence, and pointing out what was the meaning of the issues, and what must be proved." But

he left them along with the issue of "libel or no libel," and an explanation of "what was necessary to be proved to support the special defences" must have been incomplete if it was not accompanied by a direction, as to several of the questions, that the evidence was insufficient. Yet the jury found them one and all in favour of the defendants.

The last publication complained of is of a different character, and the statutory defence is not pleaded to it. It is met by "no libel" and "privilege" only. That publication appeared in *The Clareman* of January 25, 1902. It is headed "Wholesale Shooting at Kilshanny." It states that during the week no fewer than five or six parties in Kilshanny had been fired at, and it gives graphic details of one of the outrages, concluding—"The reason assigned is, that the parties purchased goods from an Ennistymon merchant who has become very notorious of late." If this report was true, a justification might have been pleaded, but it was not. There is evidence that it is a multiplication, and an exaggeration almost beyond recognition, of what actually occurred. Though, even as it stands, I assume that a jury might find that it was "no libel," it is at least capable of injuring the plaintiff in business and in reputation, by conveying that those who purchased goods from him did so at the peril of their lives and property, and by describing him as "very notorious of late." So far as it is founded on fact, it supplies pregnant evidence of the effect of the previous publications, and of the injury caused to the plaintiff by the proceedings reported in them; and it is, in my opinion, impossible to allow the finding of "no libel" upon this last publication to stand, when those upon the others are set aside. Setting it aside adds nothing to the expense of a new trial, and upholding it would prejudice the independent consideration of the rest of the case by a second jury.

There still remains the question of the jurisdiction and duty of the Court in dealing with the finding of a jury upon the question of "libel or no libel." In my opinion that jurisdiction is, *in kind and in principle*, the same as the jurisdiction to set aside a verdict upon any ordinary issue of fact upon which the jury is the final tribunal, with exclusive jurisdiction to decide. It is the duty of the Court not to set aside a finding upon any such issue as against the weight

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of evidence, if in its opinion the jury could reasonably have found as they did, upon the evidence in the particular case. If there be any difference in the exercise of this jurisdiction in cases of libel, as distinguished from other cases, it can only be a difference of degree. The limits within which this jurisdiction should be exercised, in ordinary cases, have now been narrowed to such a point, by a series of decisions of the High Court and Court of Appeal in England and Ireland, and of the House of Lords, that I can scarcely appreciate the practical possibility of further restricting its exercise in cases of libel.

Still, restricting it to the utmost, bearing in mind that opinion, as distinguished from judgment as to actual fact, comes into the question of "libel or no libel," and that express legislation, and the practice of more than a century, have specially placed that question under the dominion of the jury, I cannot support the verdict of "no libel" in this case, nor explain it except by concluding that the jury must have been influenced by considerations which ought to have been excluded from their minds. On that ground the appeal ought, in my judgment, to be dismissed with costs.

In the King's Bench the judgments of Kenny and Wright, JJ., rested substantially upon the ground which has commended itself to me. Barton, J., concurred in the result, but "exclusively on the ground that the answers of the jury are not consistent with each other." He thought that a finding of "no libel" is inconsistent with findings of privilege or excuse at common law or by statute, and he could not reconcile the finding in this case in any legal way, except by inferring that the jury did not understand the meaning of the simple issue of "no libel." I cannot agree in this, and I am bound to say so, lest it might be supposed to have been accepted here.

A plea of privilege or excuse is, in law, an argumentative traverse of malice. A publication may be defamatory and injurious, and may even be a criminal offence, but unless it is malicious, it is not civilly actionable: therefore a finding that a publication is "a libel," *i.e.* that it is defamatory and injurious, is not necessarily inconsistent with a finding, either way, upon the question of privilege or excuse, *i.e.* that it is, or is not, malicious. But even if the findings here were inconsistent, the practice is

recognised, and is salutary, of submitting to the jury questions of fact upon alternative and even upon inconsistent defences, and of taking findings upon them, to avoid the risk of a second trial. This practice prevails in actions of defamation quite as much as in any other class of action, and I therefore feel it my duty to disclaim any opinion or principle which would prevent a Judge from taking findings from the jury upon alternative issues of justification, of "libel or no libel," of privilege, or of excuse at common law or by statute. But whenever this is done, the several issues must be so left as to make it certain that each finding rests upon its own legal and proper foundation, of fact as well as of law, and that no one finding is influenced by considerations legally and properly applicable, not to it, but to some other issue.

I set aside this verdict because I am not satisfied that this was done—or rather I am satisfied that it was not done—at the trial already had, and therefore I hold the plaintiff entitled to have the case reconsidered by another jury.

WALKER, L.J.:—

As there must be a new trial of this action, I desire to say only as much as will make clear my reasons for concurring in the result we have arrived at.

The plaintiff took from the landlord a farm near Ennistymon which had been surrendered by people named Flanagan, who were not willing to give the rent of £50, which the plaintiff agreed to pay.

Timothy Flanagan, one of the former tenants interested, brought the matter before the United Irish League in the district, and it was discussed at several meetings of the League branches at Corofin and Ennistymon.

The plaintiff complained of several publications in the defendants' newspaper between the 5th October, 1901, and 25th January, 1902. The first is a letter addressed to the paper by Timothy Flanagan on the 3rd October, 1901, in which he winds up by saying: "I will continue to denounce the grabber until justice is done to his victims." The last is a report of an alleged shooting outrage furnished by a correspondent in which it was stated that shots had been fired at houses, winding up, "The

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reason assigned is that the parties purchased goods from an Ennistymon merchant who has become notorious of late."

The intervening publications complained of consist of resolutions of meetings of the Corofin and Ennistymon branches of the League in which plaintiff is described as a grabber, and his conduct as deserving of denunciation, being opposed to the principles of the League.

It appears, and it was relied on for the defendants, that plaintiff himself appeared before a League branch, and sent a letter stating his ground of defence to the charge, which letter the defendants published, and when the case was decided against him he intimated his intention to have the case reheard before a sort of appellate tribunal of the League sitting in Kilkee; but before such appeal could be heard he initiated legal proceedings by a letter from his solicitor on the 11th February, 1902.

The stage at which he intervened before the League branch, and the circumstances under which he did so, are absolutely necessary to consider before they can be materially pressed in extenuation.

The material defences are a plea of no libel under Fox's Act, and the defendants also pleaded that the publications, so far as they are expressions of opinion, were fair and *bona fide* comments made in good faith and without malice upon matters of public interest, and they also pleaded as regards the resolutions of the League branches a special defence under the Newspaper Libel Act, 1888, that they were published in the ordinary course of their business as public journalists, and were fair and accurate reports, or were parts of fair and accurate reports of the proceedings of public meetings, and that the matter was in each case of public concern, and its publication was for the public benefit. Those are necessary allegations in order to attract the protection of the Act.

Mr. Justice Gibson left to the jury, as he was bound to do, the question of libel or no libel, and the jury found that the publications were not a libel. Counsel for the plaintiff asked for a direction upon all the special defences of fair comment, and under the Newspaper Libel Act, but the learned Judge, adopting a very usual course, and as he certifies to "avoid the necessity for a new

trial," left issues of fact to the jury upon the special defences. I see no reason for interfering with the verdict on the grounds put forward in the judgment of Barton, J. The course adopted by the learned Judge is of very common occurrence at Nisi Prius, and cannot either in law or procedure be objected to, and unless it appears to have led to confusion or a failure of justice upon the main issue cannot be objected to on that ground only as a reason for setting aside the verdict. The jury found that the matters commented on were matters of public interest, also that the meetings of the committee and branch meetings of the League were public meetings within the Act, also that the meetings were held for lawful discussion of matters of public concern, and that the publications were of matter of public concern and for the public benefit. I see no reason to think that the experienced and able Judge who presided did not give right and full instruction to the jury as to what would be necessary to sustain a verdict for the defendants on these issues. He certifies that his opinion as to those findings does not coincide with that of the jury.

I may here mention that an objection has been made in argument that there was no evidence in the case of some of the meetings that what was reported took place, or that in fact such meetings were held, but I think the course of the trial was that the meetings were held, and that what was reported took place. It is indeed the *gravamen* of the plaintiff's complaint that it did.

I do not consider it necessary to say what my conclusion would have been if the only question before us were whether we would set aside a verdict for the defendants on the defence of no libel. I think, however, that the law is quite settled that in libel actions a verdict for the defendant on a defence under Fox's Act will be set aside if the Court come to the conclusion that the verdict was one which no reasonable man would have found, taking into account the subject-matter and all the circumstances. Mr. Sullivan pressed that it would not be set aside unless the verdict was found to be perverse, or there was some miscarriage. I think that is pressing the argument too far. No doubt something of the kind occurred in two of the cases cited, but in *Parmiter* v. *Coupland* (1) the verdict was set aside because it was

(1) 6 M. & W. 105.

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considered wrong on the point of the publications being libellous. The report in 6 M. & W. leaves the matter rather vague, but it appears from the contemporaneous reports in 9 Law J. Ex. 202, and 7 Jur. 701, that the ground was what I have stated. According to the report in 7 Jur., Baron Parke said:—"The plaintiff is entitled to have a new trial in this case, as the publication complained of is beyond all doubt a libellous production"; but it was set aside on payment of costs, because, as he states, "we cannot go the length of saying that the verdict is a perverse one."

That decision is certainly an authority on both branches of the argument, and the case of *Australian Newspaper Co.* v. *Bennett*(1) adopts as the test in libel whether the verdict is one which reasonable men could not possibly find. In that case, however, the Court upheld the finding of the jury for the defendants. From the nature of the subject-matter it will always be more difficult to interfere with the finding of the jury for a defendant in a libel action than in many others, inasmuch as opinion formed on all the circumstances of the case, including the interpretation of the language used, is so large a factor in arriving at a result.

But in this particular case, when I look at the specific findings of the jury on the specific questions submitted to them under the Newspaper Libel Act, I am driven to the conclusion that the jury found a verdict on those issues which no reasonable men could have arrived at, and that they were in some confusion as to the real questions before them which pursued their deliberations and influenced their conclusion in considering the defence of no libel.

For myself, I cannot see how the materials necessary to sustain a verdict under the Newspaper Libel Act can be found in the facts of this case, and I think that a verdict on the special defences should have been directed for the plaintiff.

In result, I am of opinion that the verdict for the defendants cannot be sustained, and concur that the appeal should be dismissed.

Holmes, L.J.:—

As the result of this appeal is that the action will be again submitted to the consideration of a jury, it would be unusual and

(1) [1894] A. C. 284.

inconvenient to express an opinion on many of the topics discussed by counsel.

I am, however, unable to state the grounds of my decision without referring to a few facts which have not been hitherto, and are not likely to be hereafter, the subject of controversy. In the beginning of the year 1901 the plaintiff became tenant, at the annual rent of £50, of a farm which had been in the occupation of a family named Flanagan, who had some time previously surrendered their interest and given possession to the landlord.

The letting was an ordinary business transaction, having no special or exceptional features; nor was it alleged in the pleadings, or at the trial, that the plaintiff in taking the land had been guilty of sharp practice, oppression, or disregard of the rights and interests of others. He went into possession and continued therein for several months without challenge or annoyance, and when one of the Flanagans towards the close of a public meeting, held near the plaintiff's residence on the 29th September, 1901, attempted to make M'Inerney's conduct in taking the farm a subject of discussion, he was peremptorily silenced by the chairman. A letter from the same Flanagan, published in the defendants' newspaper on the 5th October, is the earliest cause of action relied on by the plaintiff. The writer explains that if he had been permitted to deliver the suppressed oration he would have exposed a "glaring case of land-grabbing," that he considered it his duty to do as he did, and that he would continue "to denounce the grabber until justice is done to his victims."

If the readers of the *Clareman* were in doubt as to the person thus referred to, they were supplied with ample knowledge by the publications that followed. Reports of proceedings and resolutions of meetings of the Corofin Branch of the United Irish League were printed in the issues of the 2nd and 23rd November and the 21st December, of the Ennistymon Branch in those of the 16th November and 14th December, of the Inagh Branch in that of the 28th December, and of the Kilshanny Branch in that of the 4th January.

It is not my intention to refer in detail to these publications. Each of them is alleged by the plaintiff to be libellous; and it is enough for me to say, that in all except one, the charge of land-

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grabbing, expressed in or accompanied by language of obloquy and menace, is brought against him.

The case, as it was developed at the trial, was, in my opinion, entirely free from the difficulties that often arise in actions for libel against newspaper proprietors.

It was assumed by both sides that the publications were substantially accurate reports of what took place at meetings actually held. This could not be denied by the defendants, while the strength of the plaintiff's claim for damages was that the *Clareman* had disseminated, not the compositions of a fanciful contributor, but the proceedings of a powerful organization. I am therefore unable to agree with one of the Judges of the Divisional Court in his hostile criticism of the findings upon this issue. There is nothing amazing in a jury taking a view, which seems to have been acquiesced in by the plaintiff's counsel up to the conclusion of the Judge's charge, when Mr. O'Shaughnessy, who had till then been absent, questioned for the first time the accuracy of the reports. Mr. Justice Gibson was right in not embarrassing the case with innuendoes. "Land-grabbing" and a "land-grabber" are familiar words to Irish ears; and their meaning is well understood. They imply that land is acquired by dishonest, discreditable, or oppressive methods. The idea is neither novel nor peculiar to this country. The "woe" of the Hebrew prophet fell on those "that join house to house, that lay field to field," and Massinger in his best known comedy held up to odium the man who to "increase possessions and annual rents" had all men sellers and himself the only purchaser. Unfortunately in Ireland at the present time, by some strange intellectual or moral perversity, the term "land-grabbing" in a most odious sense is applied to transactions that not only are innocent in their character, but also form portion of the necessary machinery for carrying on the agriculture of the country. This, however, furnishes no excuse to a journalist who chooses to circulate the mischievous views of popular opinion to the prejudice of a blameless man. It is to be regretted that Mr. Justice Gibson, having got rid of the innuendoes, did not also sweep away the pleas that allege fair comment, or rely on the Law of Libel Amendment Act of 1888. These defences are inappropriate in a case like the present.

The publications complained of relate solely to a single business transaction between two private individuals. I cannot find anything in that transaction of public concern or the publication of which would be for the public benefit. A public meeting held to discuss it is not within the definition of the Act, and the publication of the proceedings thereat are not within its protection. I should have followed with interest any argument in support of these defences, but the only one I heard was that the plaintiff was estopped by his own action from denying that his private affairs were fit subjects for public discussion.

I have no doubt that the jury was influenced to some extent by this topic. Let us see what foundation there is for it. Flanagan's letter was published on the 5th of October. In the course of November the reports of two meetings in Corofin and of one at Ennistymon appeared in the *Clareman*. During this period the plaintiff was silent, but at length finding his customers deserting him and in view of a second meeting in Ennistymon—his own town—he procured two or three documents explaining the circumstances under which he took the farm, and brought them to one of the clergymen of his own parish who presided over the Ennistymon Branch of the League. He afterwards attended two meetings, at the first of which nothing seems to have been done, but at the second there was some kind of investigation or discussion before a committee at which he was not present. Thereupon, irritated by what he considered was unfair treatment, he determined to appeal to the executive of the League in West Clare, and he procured the insertion in the *Clareman* of two letters asking for a suspension of censure until the hearing of the appeal. It was argued from these facts that in the opinion of the plaintiff himself his taking the farm was a matter of public interest, and that therefore he ought not to be now permitted to urge the contrary. But even if he had formed this opinion it would not affect his position in the present action. It cannot be said that the defendants were influenced in the management of their newspaper, or in the selection of the subjects dealt with therein, by what was passing in the mind of M'Inerney. Moreover, there is no evidence that he regarded the action of the branches of the League and the publication of these resolutions in any other light than as an unwarrantable interference in his

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private concerns. He took no notice of the early attacks, and his subsequent visit to the curate of his parish and his two attendances at Ennistymon meetings were natural efforts to undo the mischief that had been already done, or at least to prevent it spreading. Indeed, it appears from the reports printed in the *Clareman* of the 14th December that the second of these meetings was informed that the plaintiff was contemplating legal proceedings in consequence of something that happened at the first, while the appeal to the executive, which was not announced until after the last publication complained of, if it was ever seriously intended, was soon abandoned in favour of the present action. After a careful study of the notes of the trial and full consideration of every aspect of the case, I have failed to find a single circumstance capable of sustaining a defence of statutory or other privilege.

Of course there is nothing necessarily illegal or actionable in newspaper paragraphs and comments relating to matters with which the public has no concern. There is no department of private life safe at the present day from the intrusion of the journalist, and the fierce light of publicity which was once supposed to be reserved for the highly placed now often beats upon the retiring and obscure. Private character has, however, one protection. The journalist in referring to it runs a considerable risk. If what he publishes is defamatory and he is unable to justify it the law recognises no excuse. In a case like the present, where it is for the jury to find out for themselves the meaning of the words, and where there is no question of justification, the only matter for their consideration is whether the language complained of as they interpret it was when published calculated to blacken the reputation of the plaintiff and thereby expose him to public obloquy and hatred.

The mode in which this issue is generally submitted to the jury is by putting the question whether the publication was a libel, accompanying it with some such definition as I have given, and with a warning that they must assume that there was neither justification nor lawful excuse. If this course had been followed in the present case, I am unable to say whether the result would have been in favour of the plaintiff or of the defendants. I am, however, satisfied that no inference one way or the other can be

drawn from the fact that in answer to the first of nine questions the jury found that none of the publications was a libel. Counsel for the defendants contend that they are entitled to judgment if this finding stands, and that it cannot be set aside unless we come to the conclusion that it is dishonest or perverse. This has been argued very fully, and with abundant reference to authorities, but I have heard nothing to alter the view of the law on this subject which I have always entertained, and which I can state in a few sentences. The question "libel or no libel," if the language complained of is capable of bearing a defamatory meaning, must always be submitted to a jury. Although the Judge is at liberty, and it may often be his duty to state his own opinion, he cannot direct a verdict or enter judgment for the plaintiff, unless this issue is found in his favour. Our Courts have thought it right to follow, in libel actions, the rule prescribed by Fox's Act in criminal prosecutions, and I have never known this practice departed from or doubted. But while a finding by the jury that the publication is a libel is a condition precedent to the plaintiff obtaining judgment, a finding of no libel is not necessarily final. It is liable to be set aside like other verdicts, if it is a conclusion to which reasonable men could not, or ought not, to have come. This is now the well-settled rule in all causes of action; and if it is but rarely acted on in cases of libel, this does not arise from any different principle being applicable thereto, but is due to the difficulty of applying the principle to a finding, that is to a considerable extent a matter of opinion. I am relieved from this difficulty in the present case, which can be, and, I think, ought to be disposed of on another ground.

Eight questions were submitted to the jury, on the assumption that the answers thereto might show a legal excuse for the publication. Inasmuch as for the reasons already stated this issue did not arise in the action, it is unnecessary to consider whether these findings were reasonable or not. In any case they must be eliminated, and is it possible to allow the other finding to stand when they have gone?

Have we any assurance that the jury gave independent consideration to the issue, libel or no libel? If the publications were privileged they were not libels, and it is difficult to believe that

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the jury did not consider that "no libel" was the necessary result of their answers to the other questions. This is the only way in which I can account for such an excellent tribunal as a Dublin special jury not finding that at least some of the language complained of was defamatory. In these circumstances the probability that there was miscarriage is too great to allow the judgment to stand. I am, therefore, of opinion that there must be a new trial. Mr. Justice Gibson tells us that it was from a desire to avoid this result that, contrary to his own opinion, he left the issues to the jury. I appreciate a Judge's anxiety lest a mistake on his part may increase the costs of the litigation, and I know that it is not unusual to formulate superfluous questions of fact in the hope that they may be answered in such a way as to get rid of legal difficulties. It is no reflection on a method which generally works well, that in an exceptional case like the present it brings about the evil which it was intended to avert. In giving a new trial of all the causes of action I have not overlooked the peculiar character of the last publication. I have no doubt that the Judge explained that the special issues did not apply to it, and it is possible that it was separately considered by the jury. If so, the finding on it could not be successfully questioned, and at first I was disposed to allow it to stand. On the whole, however, I think it safer to include it in our order, especially as this will not add materially to the future costs (1).

Solicitor for the plaintiff: *F. G. Kerin.*
Solicitor for the defendants: *W. Healy.*

R. D. M.

(1) The action was tried a second time before the Lord Chief Baron and a special jury of the city of Dublin in Hilary Sittings, 1903, and resulted in a verdict for the plaintiff for £600.

HAMILTON *v.* LONG (1).

(1901. No. 7967.)

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Oct. 28, 29. Nov. 3.

Action of seduction—Girl seduced while living with her father and mother—Child born after death of girl's father—Action by her mother—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *sect.* 1, *sub-sect.* 2—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

The plaintiff, a widow, brought an action for the seduction of her daughter S. The seduction took place in the lifetime of the plaintiff's husband, S.'s father, and while S. was living with her parents, who were persons of humble rank. After her father's death S. continued to reside with the plaintiff, rendering her the ordinary household services. Two months after her father's death S. was delivered of a child, the result of the seduction:—

Held, that the action could not be maintained by the plaintiff, either by the common law or by virtue of the Married Women's Property Acts.

MOTION, on behalf of the plaintiff, to enter verdict and judgment for her.

The action was brought by the plaintiff Mrs. Elizabeth Hamilton, a widow, to recover damages for the seduction of her daughter Sarah Hamilton. The defence denied that Sarah was servant of the plaintiff, and also the fact of the seduction. The action was tried before the Lord Chief Baron and a common jury of the county of Londonderry. At the hearing evidence was adduced on the part of the plaintiff that in the month of September, 1900, the plaintiff's daughter Sarah, who was at that time about twenty-five years of age, and living with her father and mother, people in a humble rank of life, was seduced by the defendant, and that as a consequence of the seduction she was delivered of a child on the 11th of May, 1901. The plaintiff's husband, the father of Sarah, had died in March, 1901, two months before the birth of the child. After her father's death Sarah had lived with her mother, helping her in the household duties. The defendant gave evidence in disproof of the seduction by him. The Lord

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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Chief Baron left the following questions to the jury:—(1) Is the defendant the father of the child of the plaintiff's daughter Sarah? (2) If so assess the plaintiff's damages. The jury answered the first question in the affirmative, and assessed the damages at £40. The Lord Chief Baron concluded his report of the trial by stating as follows:—"Until the time this verdict was given no reference had been made on either side to the question whether there was evidence that Sarah was the servant of the plaintiff. As, however, it had been proved by Mrs. Hamilton that her husband had died in March, 1901, being only two months before the birth of the child, I thought it right to call the attention of counsel to the fact that at the time of the seduction Sarah was living with her father and mother, and I suggested to them to consider whether under these circumstances the action was sustainable by the mother. As I was not aware of any decision on the question, I thought it better not to enter judgment. My own impression, however, was that as, since the Married Women's Property Act of 1882, a contract could be made by a married woman, that under such circumstances as existed in the present case the jury might infer that at the time of the seduction Sarah was the servant of both her father and mother or even the servant of her mother alone. I was not asked by either party to leave any question to the jury in relation to this matter. Had any such question been left I am satisfied the jury would have found it in favour of the plaintiff. I stated that the pleadings were to be deemed amended in any way which might be deemed necessary to raise the question." The Lord Chief Baron abstained from entering judgment, leaving either party to move.

Horner (with him *Drummond, K.C.*), for the plaintiff:—

We contend that at the time of the seduction the daughter was under a contract of service either jointly with the father and mother, or else with the mother alone. A married woman has now the same power of contracting as a *feme sole*, and the possession of separate estate is not necessary: Married Women's Property Act, 1882, sect. 1, sub.-sect. 2; Married Women's Property Act, 1893: *Whittaker* v. *Kershaw* (1). A married woman can enter into a joint contract: *Hoare* v. *Niblett* (2). Two services

(1) 45 Ch. D. 520. (2) [1891] 1 Q. B. 781.

may co-exist where, by the contract, the person employed is to be at the same time under the orders of two different people: *Hedges* v. *Tagg* (1), *per* Kelly, C.B. It is not necessary in an action of seduction to show express contract in order to establish the relation of master and servant: the right to the services or the voluntary rendering of services is sufficient: *Maunders* v. *Venn* (2); *Terry* v. *Hutchinson* (3); *O'Reilly* v. *Glavey* (4). There may be two masters: *Rist* v. *Vaux* (5). [MADDEN, J., referred to *Whitbourne* v. *Williams* (6).] In that case the girl was in the actual service of the defendant at the time of the seduction. The foundation of the action of seduction by a father is the loss of service of the daughter in which service he is supposed to have a legal right or interest: *Grinnell* v. *Wells* (7), *per* Tindal, C.J. We submit that the mother has an equal right to the services with the father. During their joint lives the father and mother could have sued jointly; on the death of the father the mother can sue alone: Bullen and Leake Precedents of Pleading, 3rd ed., pp. 171, 172.

Cooke, K.C., and *Gaussen*, for the defendant:—

Apart from the Married Women's Property Act, it is clear that the action would not lie. The plaintiff's husband was alive at the time of the seduction, and by the common law the personality of the wife is merged in that of the husband, who alone is entitled to the daughter's services. The plaintiff must have a legal right to the services at the time of the act of seduction: *Thompson* v. *Ross* (8); *Grinnell* v. *Wells* (7); *Davies* v. *Williams* (9); *Barbour* v. *Barron* (10). During the minority of the daughter the father as head of the household is in the position of master, having the legal custody and control of the daughter, and this gives him a right to her services, and is sufficient to constitute the relationship of master and servant. It may be inferred that this relationship continues to exist after the daughter attains age, but there is no authority for raising such inference in the case of the mother.

(1) L. R. 7 Ex. 283, at p. 285.
(2) 2 Mood. & M. 323.
(3) L. R. 3 Q. B. 599.
(4) 27 I. L. T. R. 36.
(5) 4 B. & S. 409.
(6) [1901] 2 K. B. 722.
(7) 7 Man. & G. 1033.
(8) 6 H. & N. 16.
(9) 10 Q. B. 725.
(10) 28 I. L. T. R. 97.

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There cannot be two services and two rights of action existing at the same period of time: *Kearney* v. *M'Murray* (1).

The Married Women's Property Acts of 1882 and 1893 do not help the plaintiff. To bring a case within those Acts there must be an actual contract with a consideration enforceable at law. There is no evidence of such here. Notwithstanding those Acts husband and wife are still in point of law one person: *Wennhak* v. *Morgan* (2).

Drummond, K.C., in reply:—

No point was made at the trial as to the plaintiff not being entitled to sue. Having regard, however, to all the circumstances, I do not propose to argue that the question is not now open to the Court. The action is maintainable by the plaintiff. Since the Married Women's Property Act, 1893, the wife may contract independently of separate estate. The daughter here on coming of age continued to serve both parents, one of them being as capable of contracting for her services as the other; why should it be assumed that she was the servant of the father only? A very slight relation of master and servant is sufficient to sustain an action of seduction. Lord Kenyon, in *Fores* v. *Wilson* (3), calls it the supposed relation of master and servant. It is absurd in these cases to talk of contract in the strict sense. Take the case of a girl residing with her mother, who is living apart from her husband; could the mother not sue in that case? [He referred to *Weldon* v. *Winslow* (4).]

Cur. adv. vult.

Nov. 3.

LORD O'BRIEN, L. C. J.:—

The facts of this case are compressed within a very narrow compass. Sarah Hamilton, the daughter of the plaintiff, lived with her father and mother in the county Longford. The father appears to have been a farmer in a very small way. During the lifetime of the father, and whilst she lived in his household, the daughter Sarah was seduced by the defendant. After the father's death the girl lived with her mother, and assisted her in the house-

(1) 28 I. L. T. R. 148.
(2) 20 Q. B. D. 635.
(3) 1 Peake, 77.
(4) 13 Q. B. D. 784.

hold duties, and was confined of a child, the result of the seduction which took place in the lifetime of the father. The question for our determination is, can the mother, who is the plaintiff, maintain an action under these circumstances? It is contended that she can. I can find no shred of authority, not even a suggestion, in any of our law books in support of that proposition—and the absence of all authority, or, as I have said, of even suggestion, is a very strong argument that the proposition is not well-founded. The action of seduction has been for centuries known to our law. It is, as Mr. Justice Willes pointed out in *Evans* v. *Walton* (1), referred to in the Year Book of 11 H. 4, fo. 2, and from that time to this, often as references to actions for seduction occur in the books, there is nothing whatever to warrant the suggestion that at common law such an action could be maintained, and indeed the Chief Baron, who tried this case, was of this opinion, because he said that if maintainable at all it is by reason of the Married Women's Property Acts. His impression was that, having regard to these Acts, the action might be maintained. I shall consider later on the effect of these statutes.

Now, at common law the action would not, in my opinion, be maintainable for this reason, namely, that to sustain an action of seduction it must be shown that the act of seduction took place whilst the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father as head of the family, and the daughter as his child, and one of the family and one of the household which he maintained. The wife may have been alive, and have directed the daughter in the discharge of her domestic duties, but these duties were rendered in respect of the house and family of which the father was the head; and, whilst the father was in that position, in the eye of the law the relation of master and servant was confined to him exclusively; indeed the wife had no separate existence apart from the husband so as to enable her to sue, save in those very exceptional instances where, for example, she was meritoriously entitled, as where she rendered services with her own hands and brain under a contract for good consideration, and even in those

(1) L. R. 2 C. P. 615, at p. 621.

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cases she could be met by a plea of abatement which necessitated the adding of the husband as a co-plaintiff. No doubt a contractual relation between father and daughter was not essential to the maintenance of the action; the relation of master and servant is enough, and this relation may be inferred from actual service, or the relation of parent and child. Mr. Justice Willes, in giving judgment in *Evans* v. *Walton* (1), said:—"I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de bon gre* or *sur* retainer, he is equally entitled to her services, and to maintain an action against anyone who entices her away." And Mr. Justice Blackburn said in *Terry* v. *Hutchinson* (2) that during the minority of the child the father had the right to the service, that is to say, a right complete in its character, or one of imperfect obligation. Now, according to *Terry* v. *Hutchinson* (2), the right to the service would be, during the minority of the daughter, in the father exclusively; it was never pretended or suggested it could be in father and mother at the same time. This being so, Mr. Cooke pertinently asked, if the right to the service was in the father exclusively during the minority, what occurred to change that relation between her attaining the age of twenty-one, and the time when she was seduced, that is, when she was between twenty-four and twenty-five years of age? The father was still alive. He continued to be head of the family, and the daughter remained in the household which the father continued to maintain.

I think if the matter rested with the common law there would be no doubt that the action was not maintainable; but it is said that a change was effected by the Married Women's Property Acts. In my opinion these Acts do not in any way affect the question; they leave it as it was at common law. As against the application of these Acts it is argued that the power of contracting thereby conferred is dependent upon the possession of separate estate, and that as it could not be pretended that the mother in the

(1) L. R. 2 C. P. 615, at p. 622. (2) L. R. 3 Q. B. 599.

present case had any separate estate the position remained unchanged. As regards this, it has been contended that the effect of the Married Women's Property Acts is to change the *status* of a married woman ; that they give her a general power to contract independently of the husband and irrespective of the possession of separate estate—that the contractual power is indefinitely enlarged, but that a judgment against a married woman could not be made good unless there be separate estate out of which it might be levied. Whatever the true view of the effect of the Married Women's Property Acts may be, whether they enlarge the contractual powers indefinitely or make the power to contract conditional upon the possession of separate estate, it is plain that these Acts were conversant with real contracts founded upon a sufficient consideration and enforceable at law. They deal with realities and not with fictions. A married woman may maintain an action as a *feme sole* if she sustains a real wrong by which real injury has been inflicted upon her. She may sue in tort or in contract, but then the tort or the contract must be a reality and not a mere fiction. The relation of master and servant, or as it is more properly described the *supposed* relation of master and servant, which flows from the relations of parent and child, is a mere figment of the law. We are clearly of opinion that the action cannot be maintained.

Having regard to the moral merits of the case, I had hoped to be in a position to dispose of the case on the grounds that the point taken was late; it was not taken until after the verdict was found, and I referred to *Foundation* v. *Keatinye* (1); but this ground was plainly not relied on before the Lord Chief Baron; on the contrary the matter was argued on the morning after the trial, and the only question then raised was that the Married Women's Property Acts gave the plaintiff a separate existence apart from the husband so as to confer a cause of action upon her. However, Mr. Drummond, counsel for the plaintiff, said he would not argue the point as to lateness in face of what had taken place, and rested his case upon the general legal merits.

(1) I. R. 9 C. L. 278.

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GIBSON, J.:—

The evidence is scanty. The father is only twice referred to in the evidence. Mrs. Hamilton mentions the date of his death, which was two months before the child was born. Sarah Hamilton states that she told her father and mother that defendant had promised to marry her. Plaintiff's counsel fairly admit that the family, who were humble folk, lived together in their small roadside cottage. Two points arise for consideration:—

1. Can the plaintiff sue at common law?

2. If not, can she sue by reason of the Married Women's Property Acts?

1. The action is founded on a wrongful interference, to the master's injury, with a subsisting relationship of master and servant. Such relationship is supported by acts of service voluntarily rendered without any enforceable contract, but the service must be to someone whom the law recognises as master. The question here is who was the master? At common law certainly it was the father. He and his wife were one. As head of the family he was guardian of his daughter during minority, and when she became adult, so long as she resided under his protection in the family home, he was regarded as master in respect of all services yielded to or for him in the course of family duty. There is no trace of suggestion in English law books that a mother during the father's lifetime could be regarded at common law as mistress jointly with her husband or separately. She was merged in her husband. In *Gray* v. *Jones* (1) a wife was joined as co-plaintiff. Pennefather, B., held the misjoinder was fatal.

2. Is the plaintiff's position improved by the Married Women's Property Acts? The Act of 1882 introduced considerable changes as to a wife's proprietary and contractual rights, but it by no means effected a general change of *status*. The nature of the alteration is explained by Sir E. Kay in *Re Jupp* (2). Thus a husband is liable for his wife's torts: *Seroka* v. *Kattenburg* (3); communication by him of a libel to his wife is not publication: *Wennhak* v. *Morgan* (4); the husband's domicile still determines

(1) Ir. Circ. R. 46.
(2) 39 Ch. D. 152, 153.
(3) 17 Q. B. D. 177.
(4) 20 Q. B. D. 635.

that of the wife; he is guardian of his children, and his religion is theirs. The contractual power given by the Act of 1882 depended on the wife's actual possession of separate estate: *Palliser* v. *Gurney* (1); *Stogdon* v. *Lee* (2). This was altered by the amending Act of 1893. The legislation, however, which relates to enforceable contracts, and was intended to alter marital and not parental rights, cannot be regarded as disturbing the father's right to his daughter's voluntary service in a case like the present of an ordinary peasant home. Where, indeed, a wife is possessed of separate estate, and is living in a home of her own with her daughter, it may be that she might be deemed to be mistress; and other exceptional cases might be put where possibly the wife could sue in her own name. Such cases can be determined when they arise. But according to the usual course of family life the father remains master and head; the service done for him, or other members of his household, is rendered to him as master; and the Married Women's Property Acts, which were passed for a different purpose, do not displace his paternal guardianship and authority. They affect him as a husband, not as a father. They do not abrogate the paternal supremacy or destroy the unity of the home. There were here no exceptional circumstances. This humble father's common law rights to his daughter's service were unaffected by property legislation in which he and his wife had no concern. Any benefit the wife personally got from the daughter's aid she received as a member of the father's family, and not as a *feme sole* or mistress. The service spoken of by the plaintiff in her evidence apparently relates to the period of widowhood.

It occurred to me that the objection which was suggested by the learned Judge might have been taken at such a late stage that the defendant could not be allowed to rely on it. If it was suggested that it could have been answered by evidence of exceptional circumstances, and that the plaintiff was misled by the course of the trial, this might be so But plaintiff's counsel frankly admitted that the plaintiff's case could not have been improved; they declined to argue that the objection was late, and the objection was discussed before the learned Judge, and dealt with by him as open and competent.

(1) 19 Q. B. D. 519. (2) [1891] 1 Q. B. 661.

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With regret I decide against the plaintiff. The father alone could complain of the wrong done in his lifetime. There is nothing to repel the ordinary inference and presumption that he was the master to whom his daughter's service was due. There was no suggestion of any separate estate or interest by virtue of which the mother could be regarded as mistress. I decline to invent a service to the mother, as mistress, which I believe did not exist. Hard cases make bad law, and fiction must stop somewhere.

MADDEN, J.:—

So long as the plaintiff's daughter was an infant, living under the dominion of her father, he was in law entitled to her services. After she became *sui juris* some evidence of actual services rendered in the household became necessary in order to give rise to the legal fiction of the existence between parent and child of the contractual relation of master and servant upon which the action of seduction is founded. This evidence is forthcoming in the present case, and leads, in my opinion, to the inference that the girl continued to be the servant of her father after she attained twenty-one. I agree with Mr. Cooke that this inference must be drawn in the absence of some evidence of changed relations after the daughter became of full age. No doubt the Married Women's Property Acts render it possible to prove by affirmative evidence that a girl living in her father's house has entered into a contract of service with her mother, either solely or jointly with her father, enforceable against the mother's separate estate. But the contract so proved would be an actual one, not the notional relation of master and servant which the law implies from the rendering of service. I do not say that these statutes may not in some cases be called in aid for the purpose of this legal fiction, as in the instance put in argument of a married woman living with her family apart from her husband. But they are, in my opinion, inapplicable to a case like the present, which is the ordinary one of a girl living with father and mother, and rendering the customary household services.

Solicitor for the plaintiff: *Patrick Maxwell.*
Solicitor for the defendant: *Sir H. Miller.*

J. G. T.

RIDDALL *v.* MULLAN (1).

Appeal.
1902.
Nov. 11, 12.
Dec. 18.

Parliament—Franchise—Inhabitant occupier—"Owner or tenant"—Sub-letting of statutory tenancy—Land Law (Ireland) Acts, 1881–1896.

The tenant of a holding subject to a statutory tenancy under the Land Law (Ireland) Acts, without the consent of the landlord, sublet the dwelling-house on the holding to her son by an agreement in writing at a rent of £2 per annum, and after the subletting and during the qualifying period continued to reside in the house with him :—

Held, reversing the decision of the Revising Barrister, that the son was not in exclusive occupation of the house as tenant, and was not entitled to the franchise as inhabitant occupier.

Glenn v. *Brennan* (29 I. L. T. R. 79 : 2 Lawson 10) discussed.

APPEAL by Thomas Riddall against the decision of Mr. D. F. Browne, K. C., one of the Revising Barristers for the North Tyrone Division, admitting the respondent Patrick Mullan to the franchise.

The name of Patrick Mullan appeared on the Supplemental List of the registration unit of Stranagalivilly, in the polling district of Dunamanagh, as an inhabitant occupier of a house situate at Stonebrack.

The case stated by the Revising Barrister set forth the facts thus :—

"The said Patrick Mullan was duly objected to by the said Thomas Riddall on the ground that he did not during the qualifying period occupy the said dwelling-house as tenant or owner thereof.

"The following are the material facts that have been established :—

"Bridget Mullan, the mother of the said Patrick Mullan, holds as tenant from year to year a farm at Stonebrack aforesaid on which the said dwelling-house is situate, and is the only dwelling-

(1) Before LORD O'BRIEN, L. C. J., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

Appeal. 1902.

RIDDALL v. MULLAN.

house on the said farm. The Land Law (Ireland) Act, 1881, applies to the said tenancy. On the 8th day of June, 1901, the said Bridget Mullan and Patrick Mullan duly executed an agreement in the words and figures following:—'This agreement made the 8th day of June, 1901, between Bridget Mullan of Stonebrack, in the county of Tyrone, of the one part, and Patrick Mullan, of Stonebrack, in the county of Tyrone, of the other part. Whereas the said Bridget Mullan being tenant of a holding situate at Stonebrack, in the said county, did on the 1st day of November, 1899, let, and the said Patrick Mullan took, all that messuage or dwelling-house on the said holding now in his occupation as tenant from year to year at the yearly rent of two pounds. And whereas the said Patrick Mullan has been since the said 1st day of November, 1899, in sole occupation of the said messuage or dwelling-house as such tenant. Now it is hereby agreed and declared by and between the said parties that the said tenancy is a valid and subsisting tenancy, and that the same is hereby confirmed, and that such tenancy shall continue from year to year until determined by either party giving to the other of them six calendar months' notice to quit in writing, such notice to expire on any 1st day of November, and the said Patrick Mullan agrees not to assign or sublet the premises or any part thereof without the consent in writing of the said Bridget Mullan. Signed, &c.'

"Since the said 8th day of June, 1901, the said Patrick Mullan has occupied the said dwelling-house, and during the same period the said Bridget Mullan has continued to reside with him. She works and manages the said farm.

"The said Patrick Mullan attended before me, and stated that he paid to his mother £2 in respect of one year's rent mentioned in the said agreement.

"No evidence was given that Bridget Mullan's landlord had consented to the letting to Patrick Mullan by Bridget Mullan, nor was any evidence given to show that the landlord was aware of the said letting.

"It was contended on behalf of the said Thomas Riddall that no tenancy could be created without the consent of Bridget Mullan's landlord, and that the sub-tenancy which the agreement purported to create was prohibited by section 2 of the Land Law

(Ireland) Act, 1881, and was therefore void; and that the said Patrick Mullan did not occupy the said dwelling-house as tenant during the qualifying period.

"I was unable to distinguish the case from the decision of *Glenn* v. *Brennan* (1), and I found as a fact that the said Patrick Mullan occupied the said dwelling-house as tenant thereof during the qualifying period. I therefore retained the name of the said Patrick Mullan on the said list. If I was wrong in so doing, the name of the said Patrick Mullan should be expunged from the said list."

Henry, K.C., and *Barnhill*, for the appellant.

Serjeant Dodd and *A. Todd*, for the respondent.

[The following cases were cited:—*Glenn* v. *Brennan* (1); *Fogarty* v. *Shanahan* (2); *O'Kane* v. *Burns* (3); *Meares* v. *Redmond* (4); *Littleton* v. *M'Namara* (5); *Beattie* v. *Mair* (6); *Hayes* v. *Corcoran* (7); *Golloghly* v. *Cannon* (8); *Barton* v. *Muldoon* (9); *Holland* v. *Chambers* (10); *Gormley* v. *Buchanan* (11); *Browne* v. *Buchanan* (12); *Simpson* v. *Hanrahan* (13). They also referred to the Land Law (Ireland) Act, 1891, sections 7 and 11.]

Cur. adv. vult.

Dec. 18.

LORD O'BRIEN, L. C. J:—

This case is said to be governed by the case of *Glenn* v. *Brennan* (1). I think not. In the latter case the claimants were in sole exclusive occupation of the qualifying premises. There is no such finding in this case, and the facts, as found by the Revising Barrister, negative the existence in the son of any right to sole exclusive occupation.

The facts are as follows:—Bridget Mullan, the mother of the claimant Patrick Mullan, holds as tenant from year to year a

(1) 2 Lawson, 10; 29 I. L. T. R. 79.
(2) [1896] 2 I. R. 273.
(3) [1897] 2 I. R. 591.
(4) 4 L. R. Ir. 533.
(5) I. R. 9 C. L. 417.
(6) 10 L. R. Ir. 208.
(7) 8 L. R. Ir. 75.
(8) 33 I. L. T. R. 88.
(9) [1902] 2 I. R. 410.
(10) 32 L. R. Ir. 156.
(11) [1894] 2 I. R. 299.
(12) *Ibid.* 318.
(13) 1 Lawson, 96.

Appeal. 1902. RIDDALL v. MULLAN. Lord O'Brien, L.C.J.

certain farm with a dwelling-house thereon. The Land Law (Ireland) Act, 1881, applies to the tenancy. On the 8th June, 1901, the said Bridget Mullan and Patrick Mullan executed the following agreement. It ran thus :—"Whereas the said Bridget Mullan, being tenant of a holding situate at Stonebrack, in the said county, did on the 1st day of November, 1899, let, and the said Patrick Mullan took, all that messuage or dwelling-house on the said holding now in his occupation as tenant from year to year at the yearly rent of £2. And whereas the said Patrick Mullan has been since the said 1st day of November, 1899, in sole occupation of the said messuage or dwelling-house as such tenant. Now it is hereby agreed and declared by and between the said parties that the said tenancy is a valid and subsisting tenancy, and that the same is hereby confirmed, and that such tenancy shall continue from year to year until determined by either party giving to the other of them six calendar months' notice to quit in writing, such notice to expire on any 1st day of November, and the said Patrick Mullan agrees not to assign or sublet the premises or any part thereof without the consent in writing of the said Bridget Mullan." This is the agreement which was executed between mother and son. There was no consent to the subletting by the landlord. I now come to what I consider the determining factors in the case. The Revising Barrister states (I quote his words) :—"Since the 8th day of June, 1901, the said Patrick Mullan has occupied the said dwelling-house, and during the same period the said Bridget Mullan has continued to reside with him." These are the words of the Revising Barrister. It will be perceived that he does not, though the agreement says the son has been in sole occupation, find as a fact that the son Patrick Mullan has been in *sole* exclusive occupation. He merely says that he has been in occupation, and adds the all-important statement that "the said Bridget Mullan has continued to reside with him." This fact of continuance of residence by the mother is, in my view, the determining and distinguishing factor. The letting to the son was void : see *Fogarty* v. *Shanahan* (1)—a decision of the Queen's Bench Division, which

(1) [1896] 2 I. R. 273.

was affirmed on appeal in this Court. No doubt though the son had a license to occupy and, to use the words of the Chief Baron in the argument in *Glenn* v. *Brennan* (1), was in actual occupation, and that not a wrongful occupation, and could maintain trespass against a third party: *Littleton* v. *M'Namara* (2), and *Meares* v. *Redmond* (3), yet he could not insist on any right to exclusive occupation as against his mother. The mother, by her continuance to reside on the premises, was, as well as the son, in actual occupation, and nothing he could do would successfully assert for him, as against the mother, a right to the sole exclusive occupation. This being so, I think the principle of *Gormley's Case* (4) applies. I venture to repeat what I said in the concluding passage of my judgment in that case:—"I cannot consider a person in sole occupation whilst there is another in actual occupation who cannot be deprived of that actual occupation by the person who claims to occupy solely. There cannot be sole occupation in one person whilst there is in another a right to remain in such actual occupation as against that one person." This was the principle upon which *Gormley's Case* (4) was decided, and, in my opinion, it is applicable to and rules the present. The decision of the Revising Barrister should accordingly be reversed, and the name of Patrick Mullan should be struck out of the register. As to the point so much pressed by Serjeant Dodd, that sect. 11 of the Act of 1896 applied to the present case, no member of the Court has or, I believe, had any difficulty as to this. This section plainly does not apply to statutory tenancies from year to year. Its application is confined to what it expressly deals with—sublettings made in violation of the Subletting Act or agreements in leases.

FITZ GIBBON, L. J.:—

My opinion against the vote claimed is clear, but it is right to distinguish the case from *Glenn* v. *Brennan* (1), and to show that the vote here could not be upheld consistently with previous decisions of this Court, in registration cases and upon the law of landlord and tenant. In *Brennan's Case* (1) the

(1) 29 I. L. T. R. 79.
(2) I. R. 9 C. L. 417.
(3) 4 L. R. Ir. 533.
(4) [1894] 2 I. R. 299.

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claimant had the exclusive occupation of the dwelling-house for the entire qualifying period, having held it for two years from the judicial tenant under a contract of tenancy, and paid rent to him. In this case Bridget Mullan holds, as tenant from year to year, the farm on which the house stands of which Patrick Mullan claims to be the "Inhabitant Occupier." The Land Act, 1881, applies to the tenancy: the house in question is the only dwelling-house upon the holding, and during the entire qualifying period Bridget Mullan "*continued to reside*" in it with her son, and she works and manages the farm, of which she is the statutory tenant.

The agreement of June 8, 1901, under which Patrick Mullan claims the franchise, purports to confirm the letting made on November 1, 1899, and to declare that it created a valid and subsisting sub-tenancy in the house in Patrick Mullan as tenant from year to year to Bridget Mullan. But Bridget Mullan remained in the exclusive possession of the farm which is part of the statutory holding, but is not included in the subletting, and she also continued to reside in the only dwelling-house upon the holding as her only dwelling-place.

During the argument and the re-argument of *Brennan's Case* (1) three points were made in support of the vote; difference of judicial opinion manifested itself upon each of them, and this difference continued to the end, for the judgment was announced as that of "the majority of the Court." The reasons were never given. The Master of the Rolls and I were the dissentient minority.

The contentions in favour of the vote were—(1) That a subletting of a holding under the Land Act, 1881, was voidable only, and not void; (2) that, inasmuch as the claimant was in the exclusive occupation of the qualifying premises during the qualifying period, and was deemed to hold as "tenant," the Registration Court should not go into the question of the validity of his title; (3) that, even assuming the subletting to be illegal and void, the exclusive occupation of the premises was actually enjoyed by the claimant by permission of the statutory tenant, and could not be rendered wrongful as against him without a demand of possession;

(1) 29 I. L. T. R. 79.

accordingly that, until such demand, the occupier was not merely a licensee or permissive occupier, but was a tenant at will, and having occupied as such was entitled to the franchise.

It has been decided in Ireland that exclusive occupation by a tenant at will is enough to give the franchise; but it is settled, both here and in England, that a permissive occupant and licensee does not occupy "as owner or tenant" for the purposes of the Parliamentary franchise.

The first point of difference in *Brennan's Case* (1) has since been set at rest by the decisions in *Fogarty* v. *Shanahan* (2), and *O'Kane* v. *Burns* (3).

Fogarty v. *Shanahan* (2) is the unanimous decision of the Queen's Bench and of this Court, that a subletting of a statutory holding is "prohibited by statute," "unlawful," "illegal," and "absolutely void." Unless the Act of 1896 has since provided otherwise, such subletting can convey no estate, can create no tenancy, can transfer no interest, cannot change the possession, and cannot divest or disturb any right or occupation of the lawful tenant.

O'Kane v. *Burns* (3) went even further than *Fogarty* v. *Shanahan* (2), for this Court there held that the illegal subletting could not confer upon the so-called sub-tenant even an occupation upon which he could be sued by the subletting tenant, either in debt for rent, or in use and occupation for compensation upon a *quantum meruit*.

Though I cannot reconcile *O'Kane* v. *Burns* (3) with *Brennan's Case* (1) on any grounds satisfactory to myself, both are decisions of this Court, and I must assume that they are not contradictory. The only imaginable mode of reconciling them is by holding that exclusive occupation under an illegal and void subletting will, until demand of possession, qualify the occupier because he holds "*as* tenant," though he is not a lawful tenant. But his occupation cannot have this effect unless it is sole and exclusive, and the difference in the facts between this case and *Brennan's Case* (1) makes it impossible to sustain Patrick Mullan's claim upon that ground.

(1) 29 I. L. T. R. 79. (2) [1896] 2 I. R. 273. (3) [1897] 2 I. R. 591.

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Bridget Mullan "continued to reside" in the dwelling-house. No demand of possession was necessary to restore her to an occupation which she never discontinued. Her residence in the house with her son continued to be referable to her tenancy, and her right of occupation was not affected by her illegal and void attempt to sublet. She could have resumed the sole and exclusive occupation at any time by locking the claimant out, or by telling him to get out. He could neither turn nor keep her out, nor bring trespass against her. All the time she had the right to say "*j'y suis, et j'y reste*," and, so long as she could say that, no one else could have the sole and exclusive occupation which is essential to the household franchise.

Bridget Mullan's position was far stronger, both in law and fact, than that of the next-of-kin of deceased tenants whose continuance in occupation has been so often held by the majority of this Court to be fatal to the exclusive occupation of any one member of the family, even of the recognised or statutory tenant. This Court has conclusively and repeatedly held that unless there is evidence of a valid release of that "specific interest" which each resident next-of-kin of a deceased tenant has in a holding which two or more continue to occupy, no one of them can be in sole occupation "as owner or tenant." These decisions are none the less binding because I dissented from them.

In *M'Gee's Case* (1) one next-of-kin besides the claimant was in occupation: she was produced as a witness, and she said she made no claim. Yet the Chief Baron said—"Still, however, more than one next-of-kin was in actual possession, and there was no greater or other estate, either by estoppel or otherwise, in one of those in possession than there was in each of the others": *Holland* v. *Chambers* (2).

My Lord Chief Justice has anticipated me by quoting from his judgment in *Gormley's Case* (3) a passage which is conclusive in the present case. There a widow and son continued to reside together, and the son had been accepted by the landlord as the sole tenant. The Chief Justice says—"I cannot consider a person in sole occupation whilst there is another in actual occupation *who*

(1) 1 Lawson, 90. (2) [1894] 2 I. R. at p. 296. (3) *Ibid.* at p. 302.

cannot be deprived of that actual occupation by the person who claims to occupy solely. There cannot be sole occupation in one person whilst there is in another *a right to remain* in such actual possession as against that one person."

Fitz Gibbon, L.J.

Bridget Mullan has "a right to remain" in occupation of the dwelling-house as against her son; she cannot be turned out by Patrick, who "claims to occupy solely."

In the same case Porter, M.R., said (p. 303)—"That he (the son) was in occupation as tenant is plain. The question is, was he in *sole* occupation as tenant." He affirmed the finding that he was not, because his mother "remained in some sort of occupation of the farm."

Palles, C.B., said—"I cannot hold that the claimant is in sole occupation of that of which his mother has the same actual occupation, *unless he shows a good title to that sole occupation as against his mother.* . . It is impossible to hold that the so-called acceptance of the son as tenant created a new tenancy. . . So far as regards the right to the franchise, that acceptance, unaccompanied as it has been by sole occupation, appears to me to be *wholly inoperative.*" Bridget Mullan's so-called subletting cannot be more operative than the landlord's "so-called acceptance" of Patrick Mullan as tenant would have been.

To the same effect is the decision in *Simpson* v. *Hanrahan* (1), where a widow and son had for fifteen years "continued to live" on a farm. For nine years the widow had paid the rent and got the receipts in her own name. But for the last six years the landlord had accepted the son as tenant. Yet this Court affirmed the decision of the Revising Barrister that he was "not in sole occupation."

Barry, L.J., sums up the principle of all these decisions in *Brown's Case* (2) in these words:—"The mere selection of one of the next-of-kin as tenant by the landlord does not *per se* change the character of the occupation. The *onus* lies on the person so selected, if he claims the franchise, to prove a change in the character of the occupation; and if he gives no evidence to prove relinquishment of their claims by the others he fails to satisfy that

(1) 1 Lawson, 96. (2) [1894] 2 I. R. 318.

Appeal. 1902.

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Fitz Gibbon, L.J.

onus, and he must be held by the Barrister to be in joint occupation with the others."

Here there is no evidence except of an illegal and void agreement and attempt to sublet, followed by the continuance of the lawful tenant in actual occupation of the qualifying dwelling-house. A different result in this case from that which was reached in the cases of the next-of-kin would reduce the decisions of the Court to complete confusion.

It only remains to say that the Act of 1896, sect. 11, does not touch *Fogarty* v. *Shanahan* (1) or *O'Kane* v. *Burns* (2); it does not apply to statutory tenancies from year to year, but only to sublettings made in violation of the Subletting Act, or of agreements in leases. These it validates *sub modo* as between the parties to them. But sect. 2 of the Act of 1881, which prohibits the subletting or subdivision of holdings from year to year, is still in force, and by sect. 50 (2) is to be read with the Act of 1896.

WALKER, L. J.:—

I concur in the decision that the respondent is not entitled to the franchise for the reasons stated by the Lord Chief Justice. I think the case is quite distinguishable from *Glenn* v. *Brennan* (3).

HOLMES, L. J.:—

Mullan, the person objected to as a voter, has been living with his mother in a dwelling-house on a farm held by her under a tenancy to which the Land Law (Ireland) Act, 1881, applies; and on the 8th June, 1901, she and the son executed a document reciting that on the 1st November, 1899, she let, and the son took the dwelling-house, in which they had been residing as tenant from year to year at the yearly rent of £2, and further reciting that he had been since in sole occupation of such house as such tenant, and declaring that such tenancy is a valid and subsisting tenancy, and should continue from year to year until determined as therein provided. After the execution of the document, the mother and son continued to live together as before, she working and managing

(1) [1896] 2 I. R. 273. (2) [1897] 2 I. R. 591.
(3) 29 I. L. T. R. 79; 2 Lawson, 10.

the farm, and he having, according to his own account, paid her £2 in respect of the rent of the house. In this state of things, the Revising Barrister says that he was unable to distinguish the case from *Glenn* v. *Brennan* (1); and he found as a fact that the man occupied the dwelling-house as tenant thereof during the qualifying period. I do not understand that this finding was anything more than the inference drawn by the Revising Barrister from the circumstances previously set forth, when looked at in the light of *Glenn* v. *Brennan* (1), and that this Court is not precluded by it from holding that the son had not such an occupation as entitled him to the franchise, if that is the only conclusion warranted by the facts certified in the case.

The discussion in *Glenn* v. *Brennan* (1) turned upon section 2 of the Land Law (Ireland) Act, 1881, a section which, it was held in this Court in *Fogarty* v. *Shanahan* (2), has the effect of making illegal and void any subletting or subdivision of his holding by the tenant from year to year, of a tenancy to which the Act applies.

Glenn v. *Brennan* (1) is an unsatisfactory case, inasmuch as it is impossible to ascertain either the grounds of the decision or the question of law decided. It was twice argued, and after the second argument it was announced that a majority of the five Judges by whom it was heard *held*, that the person claiming to be a voter was entitled to be placed on the register, for reasons to be given at a future time which has not yet arrived. It is possible that there was only a majority of one; that the three who composed it arrived at a conclusion on different grounds; and that one or more of them may have adopted a view, strongly pressed in argument, that the letting was voidable and not void, a view rejected by this Court in *Fogarty* v. *Shanahan* (2).

It would be unreasonable to ask a Judge to follow this case as an authority contrary to his own conviction; and I take the liberty of saying that even if the facts now before the Court were similar to those in *Glenn* v. *Brennan* (1), I should be disposed to hold that they would not confer on Mullan a right to the franchise.

The tenant who purported to make the subletting in *Glenn* v. *Brennan* (1) left the premises, and during the qualifying period

(1) 29 I. L. T. R. 79; 2 Lawson, 10. (2) [1896] 2 I. L. 273.

Appeal. 1902.

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Holmes, L.J.

the sub-tenant was the only person in visible and physical possession and occupation. Still his occupation could only be referred to as an illegal and void tenancy, and would, therefore, not be occupation as a tenant. No doubt he was not a trespasser as against the person who made the letting until such person did some act terminating the implied license or permission to be there; but he resembled in this respect a caretaker or a friend living in a house by invitation during the temporary absence of the owner. The present case differs from *Glenn* v. *Brennan* (1), in that Mrs. Mullan after the subletting continued to reside in the house as she had done before, and to work and manage the farm. Nothing has happened beyond an attempt to do an illegal act; and finding the lawful tenant in visible occupation of the whole of the subject-matter of the tenancy, I am unable to hold that a person who is living in the house with her, but who is not tenant actual or constructive, is occupying this house as tenant. Thus far I have dealt with the question on which the case was stated, and which was the only one opened by Mr. Henry for the appellant. I do not, however, overlook what was pressed by Serjeant Dodd, and evidently regarded by him as the weightiest argument in the respondent's favour. He contended that section 2 of the Act of 1881 is repealed by the 11th section of the Act of 1896. There is only one answer to be given to this, which, however, seems to me to be conclusive. The last-mentioned section in express words applies to a letting in violation of either the Subletting Act of George 4, or of an agreement against subletting in the landlord's lease; and the letting to Mullan comes under neither category.

I am aware that Serjeant Dodd argues that I am not at liberty to assume that Mrs. Mullan did not hold under a lease containing an agreement against subletting, but I am clearly of opinion that it was for his client to prove that there was such a lease if he wishes to escape the consequences of section 2 of the Act of 1881.

For these reasons, I think that the appeal ought to be allowed.

Solicitor for the appellant: *William Wilson.*

Solicitors for the respondent: *Todd and Mark.*

G. Y. D.

(1) 29 I. L. T. R. 73; 2 Lawson, 10.

THE KING (BOURKE) *v.* THE JUSTICES OF DUBLIN (1). THE KING (MORIARTY) *v.* THE SAME.

K. B. Div.
1902.
Nov. 25, 27.
1903.
Jan. 13, 14.
Feb. 2.
Appeal.
Feb. 18.

Licensing Acts—License—Undertaking to use for purposes of hotel, and not otherwise—Violation of undertaking—Good character—Condition for payment of sum of money to be applied in extinguishing another license—Public policy.

An applicant for the usual certificate of good character to enable him to renew his license in 1901 gave an undertaking in open Court to persons objecting to the granting of the certificate that he would remove a public drinking bar which he had opened, and conduct his premises for the future as a hotel in accordance with an undertaking given to the Recorder when the license was originally granted in 1899. He failed to remove the drinking bar or to conduct his premises as he had agreed:—

Held (by the King's Bench Division and Court of Appeal), that such conduct was evidence to sustain the decision of a licensing authority, before whom the application came for a certificate of good character in the following year, that the applicant was not of "good character" within the meaning of the Licensing Code.

The applicant for a new license in the year 1899, in consideration of same being granted, paid into Court a sum of £400 to be applied in purchasing and extinguishing an operative license with the approval of the Court, and also gave an undertaking to use the license for hotel purposes only:—

Held (by the King's Bench Division), that the undertaking so given was void.

The payment of money by the licensee ought not to be made a condition for granting a license under the Licensing Acts.

MANDAMUS AND PROHIBITION.

Jeremiah Bourke applied to the Right Hon. the Recorder of Dublin for a new publichouse license for his premises 38 and 39, Parkgate-street, at the Hilary Licensing Sessions, January 14, 1899, and his application was opposed on the ground of the number of previously licensed houses in the neighbourhood. The applicant was present in person, and was represented by counsel,

(1) Before PALLES, C.B., and BARTON and WRIGHT, JJ.

K. B. Div. 1902.

THE KING (BOURKE) *v.* JUSTICES OF DUBLIN.

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instructed by his solicitor Mr. Bergin. The case was adjourned, and on January 25, 1899, an undertaking was written in the book of the Clerk of the Peace on behalf of the applicant, and signed by his solicitor Mr. Bergin. This undertaking was as follows:—"County of the City of Dublin. Sessions House, Green-street. Hilary Sessions, 1899. Saturday, 14th January. *Re* Jeremiah Bourke, 38 and 39, Parkgate-street, and Infirmary-road. The applicant undertaking to lodge in Court £400 to be applied hereafter in buying up or extinguishing an operative license, as the Court may approve, and also that the bar to be opened in pursuance of the license, if granted, shall be made use of for hotel purposes only, and be a supply bar merely for the accommodation of guests at applicant's restaurant or persons stopping at his hotel, and not in any sense a public drinking bar. The application is for a hotel license only; any question as to structure and extent of premises to be open for discussion at Confirmation Sessions. Dated 25th January, 1899. (Signed), Michael S. Bergin, solicitor for the applicant." A few days afterwards the £400 was lodged by the same solicitor with the Clerk of the Peace, and there was added a footnote to the above-mentioned undertaking:—"Cheque for £400 lodged 2/2/'99."

The new license was then granted to the applicant, and the £400 was applied in or towards buying up and extinguishing another license. The said new license was confirmed at the Annual Licensing Sessions in 1899, and again in 1900, without objection. During the year 1901, however, Bourke converted his premises into a regular drinking bar, and supplied all persons with drink indiscriminately, and on his license coming on for renewal at the Annual Sessions in 1901, the renewal was objected to by J. B. Moriarty and by the police on the ground that Bourke had violated the undertaking he had given on the occasion when he obtained the license. What took place on this occasion is fully stated in the passage of Mr. Swifte's written judgment cited by the Lord Chief Baron, *infra*, p. 436.

At the Annual Licensing Petty Sessions on 1st October, 1902, before Mr. Wall and Mr. Swifte, Divisional Justices of the Metropolitan Police District, Bourke applied for the usual certificate required by sect. 14 of 17 & 18 Vict. c. 89 as to his

good character and the peaceable and orderly manner in which the premises had been conducted during the previous year. The application was opposed by J. B. Moriarty and the police on the ground that the applicant was not of good character within the meaning of the section. The case was adjourned to 8th October, 1902, and then heard. Evidence was given proving that Bourke had systematically maintained the public drinking bar during the previous year in violation of the two undertakings given as above-mentioned. The applicant repudiated the first undertaking as having been given by his solicitor without authority. It was admitted that the applicant had always conducted the licensed premises in a peaceable and orderly manner, and except that he had not complied with the terms of the said undertakings, no fault was to be found with his conduct of the said licensed premises, and nothing was to be said against his character. The applicant stated that he was present in Court on January 14, 1899, when his application for a new license was before the Recorder, that his counsel then stated on his behalf that if he obtained a license he would keep in his licensed premises a supply of food for all such persons as asked for food, but it was not stated by his counsel or by anyone else that he would not supply, or would undertake not to supply liquor to persons who called for same, and who did not require food. The applicant further swore that he was not present in Court when his solicitor signed the undertaking in the Clerk of the Peace's book; that he was wholly unaware of the undertaking being so given; that he did not authorize his solicitor to give it; that no such undertaking was asked for or suggested at the hearing on the 14th January; that the only undertaking asked for and given was the undertaking to supply food; and that he had fully and faithfully carried this out. He had paid the £400 into Court, and the sum was applied in the extinction of a license. As to the second undertaking above-mentioned given at the Sessions in October, 1901, the applicant admitted that not having time (as he said) for consideration, he left himself in the hands of his counsel as to carrying out the undertaking previously given without his sanction by his solicitor, but he stated that the Divisional Magistrates wholly refused to accept or listen to any such undertaking, or to grant any renewal in consequence thereof,

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or to take into account at all, or to act in any way upon any undertaking or statement of counsel, or to base the renewal upon any except statutory grounds. The objector J. B. Moriarty contended that the magistrates ought not to certify as to the good conduct of the applicant on the ground that the violation of the conditions on which he had obtained his license constituted bad character within the meaning of the Acts, or, in the alternative, that the license was bad *ab initio*, as the conditions on which it had been granted were illegal.

The Divisional Magistrates gave judgment on the 22nd October, 1902, Mr. Wall holding that the license was an ordinary publichouse license; that the undertaking formed no part of the license; that so far as it sought to impose restrictions on the license such restrictions were repugnant and void; and that the repudiation of the undertaking which was void did not constitute evidence of bad character. Mr. Swifte held the undertaking was in fact given by Mr. Bergin with Bourke's knowledge and approval; that this undertaking, that the license if granted should be used for a hotel only, was a valid undertaking and formed the basis on which the license was granted; that it was not repugnant; and that its violation constituted bad character within the meaning of the Acts; and he also was of opinion that the requiring payment of the £400 as a condition for granting the license rendered the license void *ab initio*.

Mr. Wall proposed to sign the certificate to enable Bourke to obtain a renewal, but Moriarty objected that he had no jurisdiction to sign the certificate, as it should be a judicial act of the majority of the Bench. Mr. Wall then consented to hold over the certificate for a few days to enable Moriarty to apply for a writ of prohibition.

On the 30th October, 1902, Moriarty obtained a conditional order for a writ of prohibition directed to Mr. Wall prohibiting him from signing the certificate.

On the 28th November, 1902, Bourke obtained a conditional order for a mandamus directing the Divisional Magistrates to rehear his application for a certificate. Cause was shown against both conditional orders, and the Court was asked to make each

order absolute notwithstanding cause shown. Both cases were argued together.

The Right Hon. The Macdermot, K.C., and *James O'Connor*, for Jeremiah Bourke.

The Solicitor-General and *Morphy*, for the Crown.

Henry, K.C., and *Dunne*, for J. B. Moriarty.

The arguments sufficiently appear from the judgment of the Lord Chief Baron.

[The following cases were cited:—*R.* v. *Wilkinson* (1); *The Queen* v. *Mann* (2); *R.* v. *Lancashire Justices* (3); *The Queen* (*Lambe*) v. *The Justices of Armagh* (4); *R.* (*Cox*) v. *The Recorder of Dublin* (5); *R.* (*Jones*) v. *The Justices of Kerry* (6); *R.* (*Morell*) v. *Justices of Antrim* (7); *The Queen* (*M'Kenney*) v. *Justices of Antrim* (8); *Leader* v. *Yell* (9); *Reg.* v. *Bowman* (10).]

Cur. adv. vult.

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The decision of both of these cases rests upon the same question, because, if Mr. Bourke, the prosecutor in the first case, is not entitled to a mandamus to compel the Justices to rehear his application for a certificate, there undoubtedly must be a prohibition to them against signing a certificate based upon the equal division of the Justices on the original hearing. Where the Justices are equally divided in opinion upon the application for a certificate, one of such Justices has no jurisdiction to sign it, although he would have such jurisdiction had the application been heard by himself alone.

Thus the question here is, is Mr. Bourke entitled to a mandamus to rehear?

(1) 10 L. T. (N. S.) 370.
(2) L. R. 8 Q. B. 235.
(3) 55 J. P. 580.
(4) [1897] 2 I. R. 57.
(5) 16 L. R. Ir. 424.
(6) [1897] 31 I. L. T. R. 47.
(7) [1900] 2 I. R. 492.
(8) [1901] 2 I. R. 133, 162.
(9) 16 C. B. (N. S.) 584.
(10) [1898] 1 Q. B. 663.

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His right to that writ has been contested on two grounds. Of these, the first was relied upon solely by Mr. Dunne, counsel for Mr. Moriarty. The Solicitor-General, who appeared for the police, distinctly declined to rely on it, and was inclined to argue rather against, than in favour of, it. The second ground was relied upon by both the Solicitor-General and Mr Dunne.

The first ground was that the certificate granted to Mr. Bourke for the original license was void; that therefore the license granted under it, and the renewal of that license, were also void; that therefore he had not, when he applied to the Justices for the certificate, the *status* of a licensed person, or any right to ask them for a certificate; that consequently there neither was nor is any duty upon the Justices to hear the application; and that, as there can be no mandamus without a duty, the application should fail.

The contention that the original certificate was void *ab initio* was based upon the conditions which the applicant undertook to perform when that certificate was granted. In urging this objection, Mr. Dunne adopted one of the arguments of The Macdermot, the counsel for Mr. Bourke, that the terms of the undertaking as to the conduct of the licensed premises were inoperative and void; and argued that, although they were, it must be presumed that the learned Recorder had some object in requiring them; that he gave some effect to them, and to the fact that in pursuance of them £400 had been lodged in Court; and that he took those facts, *inter alia*, into consideration in determining whether he would or would not grant the certificate. He further argued that these facts were matters which, in law, ought not to have been taken into consideration; and that, therefore, the decision partly induced thereby was void. In support of this argument he relied upon one of the propositions contained in the judgment in *Reg.* v. *Bowman* (1), and he insisted that the opinion there expressed by Wills, J., upon the second question there was not an authority that the provision that the £400 here should be applied in buying up or extinguishing an operative license would render that payment lawful.

The objection thus raised, if valid, would, I am given to

(1) [1898] 1 Q. B. D. 663.

understand, affect the rights of many hotel-keepers in the city, who, it is stated, have expended large amounts of money in building hotels upon the faith of the legality of the practice of taking such undertakings as are in question here, and of requiring money to be expended in purchasing up and extinguishing licenses. It involves, too, in addition to the original validity of the license, the question whether its validity is questionable in a proceeding like the present, whilst the license has not been quashed upon *certiorari*, or its validity otherwise directly questioned in an independent proceeding, Continuing, as I do, to hold the view I expressed in *The Queen* v. *Runciman* (1), that questions of grave importance should be raised in such a form as to be capable of being ultimately brought to the House of Lords, I shall, upon the present motion, decline to consider this first objection. Consequently, were this the only objection raised, I should be of opinion that the mandamus should go, leaving it to the defendants to rely upon the alleged invalidity of the original certificate, the license, and its renewal, by the return to the writ.

The second ground relied upon as an answer to the motion was that Mr. Swifte was not bound to sign a certificate of good character, because it was alleged that he was justified, upon the evidence, in holding as a matter of fact, that the conduct of Mr. Bourke was such as was calculated to affect, and did in fact affect, his reputation, and that although Mr. Wall, from that evidence, drew, as he was undoubtedly entitled to draw, an inference of fact contrary to that arrived at by Mr. Swifte, yet that Mr. Swifte was justified in law in drawing the inference that Mr. Bourke was not a person of good character—in other words, that the question was one of fact, with evidence both ways, so that an inference either way could, in law, be legitimately drawn by the tribunal of fact.

As I understand the facts, and the admission of the Solicitor-General, Mr. Bourke was and is a "person of good character," that is, "of good reputation amongst his neighbours" (*Leader* v. *Yell* (2)), unless that good reputation had been affected by the open and notorious mode in which his licensed premises had been

(1) 28 L. R. Ir. 527, at p. 550. (2) 16 C. B. (N. S.) 584, at p. 595.

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conducted—a mode which was admittedly in wilful violation of the two undertakings which have been referred to during the argument. One of those undertakings, that of January, 1899, upon the faith of which, I have no doubt, he obtained his original certificate, was given by his solicitor. The second, that of 1901, on his application for the certificate for the renewal of his license, was given by his counsel. But there is evidence (as to the weight of which I say nothing, as it is not within my province) that each of those undertakings was given with his knowledge and by his authority.

The circumstances under which the second of those undertakings was given are conveniently summarized by Mr. Swifte in his judgment:—"During the early part of the year 1901, however, he appears to have largely extended his counter, and converted it into a regular drinking bar, with the result that, at the October Licensing Sessions of 1901, in this Court, which was then constituted just as it is now, the renewal was strongly objected to both by the police and by certain members of the Dublin public, the objection in both cases being the same, and founded on the flagrant violation of his undertaking. On that occasion Mr. Lynch, of the Chief Crown Solicitor's office, appeared for the police, and the Solicitor-General, Mr. James Campbell, K.C., for other objectors; while Mr. Bourke was represented by Mr. Bushe, K.C., and Mr. Healy, K.C. The case was fully heard before us on the 5th of October, when several witnesses, including the applicant, were examined and cross-examined. As I had the misfortune of being inclined to take a different view from the Chief Magistrate, it was arranged that our late colleague, the late Mr. Byrne, K.C., should be asked to attend for the purpose of having the case re-argued; and the re-argument was fixed for the 22nd October—this very day year, by the way. Accordingly, we three duly came into Court together on that day, when Mr. Bushe, as leading counsel for the applicant, asked for a short adjournment, which was of course granted. Within some twenty minutes, as I now best recollect, we were called into Court again, when Mr. Bushe proceeded to state we should not be troubled with the case any further, as all the objections had been withdrawn, on the terms of the applicant renewing his undertaking, and he endeavoured to hand in a document purporting to be such renewed undertaking. He was, however,

peremptorily stopped by the Chief Magistrate, who refused to hear anything about the undertaking or to let the document be received. . . . The Solicitor-General then stood up, and claimed to be heard on a matter of interest to the public; and he, as I presume more in his capacity of an officer of the Crown than as counsel for the objectors, was allowed to make a statement; and his statement was that the applicant had consented to renew his undertaking of January, 1899, and had expressed regret for having violated it, and undertook to remove the extended counter or drinking bar on his premises within a month; and that he (the Solicitor-General) wished the public to understand that it was entirely on the faith of this promise that the objectors consented to withdraw their objections. The objections were then allowed to be withdrawn, including the police's, without question, and the certificate for renewal was duly signed." All the facts thus summarized are proved by the affidavits before us.

Speaking for myself, if the sole matter relied upon as evidence affecting the applicant's character were the original undertaking of January, 1899, I should have yielded to The Macdermot's argument, and held that the breach of it, although notorious, was not sufficient to prevent his continuing to enjoy the reputation of good character he had previously borne. The breach of that undertaking was not only not criminal, but it was not even a legal wrong—an *injuria*. I hold that the undertaking was void *ab initio*; that in point of law it was non-existent; and that the legal rights of the applicant must be determined as if it had not been entered into at all. Want of morality, and breach of honour, have been relied on by the Solicitor-General, but having regard to *Leader* v. *Yell* (1), I decline to enter upon ethical considerations in relation to such an undertaking.

As regards, however, the undertaking of 1901, and its breach, I have arrived at a different conclusion. Although I agree with the opinion expressed by Mr. Swifte on another part of the case that the applicant's conduct of the premises, in violation of his undertaking, was not *per se* evidence that the premises had not

(1) 16 C. B. (N. S.) 584.

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been conducted in "a peaceable and orderly manner" within the 17 & 18 Vict. c. 89, and although I am of the opinion I have already expressed as to the effect of that conduct upon his reputation, I hold that those matters were, in 1901, so far matters of doubt, evidenced, if evidence were necessary, by the difference of opinion in respect of at least one of those matters between the Chief Magistrate and Mr. Swifte, that the withdrawal of the objections to Mr. Bourke's application for a certificate was a valuable consideration for the contract made by him. I consequently hold that there was evidence of a valid contract between Mr. Bourke and the objectors in 1901, to remove his extended bar, and conduct his premises for the future in accordance with the former undertaking. That contract was entered into in a public Court, and so as to be capable of becoming notorious, and the intentional and habitual conduct of his licensed premises in breach of that undertaking—whether such breach was contemplated when the contract was entered into, or whether it was only subsequently determined on—was, in my opinion, a continuing and deliberate legal wrong to the public (who had been represen ted by the objectors), in a matter in which that public had, and was recognised by the Licensing Code as having, an interest. After, as I am not ashamed to confess, some fluctuation of opinion, I have arrived at the conclusion that I cannot say that such conduct is not capable of affecting and derogating from the good reputation as a licensed publican which, on the evidence and admissions, I must hold that Mr. Bourke would otherwise have had.

Upon the whole, then, I am of opinion that there was evidence to sustain Mr. Swifte's decision, and consequently that the cause shown against the rule for the mandamus should be allowed, and the rule discharged; and that the cause shown against the rule for prohibition should be disallowed, and that rule made absolute.

We have considered the question of costs, and we are of opinion that under all the circumstances there should be no costs to any party.

Thus far I have dealt solely with matters of strict law, but I should like, speaking for myself, to say a word with reference to

another aspect of the case. In my opinion the practice of taking such undertakings as those before us is irregular, and having regard to the probability of advice that the publican may be reasonably expected to receive as to their legal validity, not unlikely to lead to results such as we have had in the present case. I know that the practice was adopted from the most laudable motive, and in consequence of the apparent hopelessness of having our Licensing Code, teeming as it does with provisions requiring alteration, considered by Parliament within any reasonable time. Happily, however, one of the many defects in that Code has been to a certain extent cured by the Licensing Act of last Session.

The effect of that Act is that the learned Recorder can now legally grant an hotel license, the legal effect of which will be that, and no more than that, which the old publican's license would have had, had it been capable in law of being controlled by an undertaking such as that which we have here. Therefore a license can now be granted by the sole operation of which Mr. Bourke would be legally bound to limit his trade in the manner contemplated by the undertaking. A sum of £400 has been obtained from him as a consideration for the license. There is no fund out of which this can be repaid to him. Large sums have been expended by him on the premises to render them capable of being used as an hotel. That expenditure will be wasted if the premises cannot be so used, and they cannot be so used without a license. I think it is a matter of deep regret that when it was known to be likely that there would be a difference of opinion between the two Justices on a question of fact involving so large a possible loss, the procedure was not adopted of calling in a third Divisional Magistrate so as to ensure a majority one way or the other. As matters now stand, if our present order be not reversed by the Court of Appeal, the applicant will have lost his license by an equal division of opinion.

I do not pretend that the conduct of Mr. Bourke can be justified; but I think it open to doubt whether it did not result from legal advice that may have been given to him as to the character of the undertaking. But, under any circumstances, the penalty he will incur if his license be wholly lost will, in my view, be out

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of all proportion to his offence; and since the late Act it is not necessary to resort to deterrent punishments to prevent hotels being used as public-houses.

Under all these circumstances, I venture to suggest that, if this order be affirmed on appeal, it should be considered whether a hotel license, under the Act of last Session, might not, without detriment to the interests of the public, be granted to the applicant or, at the very least, to a purchaser of his interest.

BARTON and WRIGHT, JJ., concurred.

J. L.

Appeal. Feb. 18.

Jeremiah Bourke appealed to the Court of Appeal (FITZ-GIBBON, WALKER, and HOLMES, L. JJ.)

The Right Hon. The Macdermot, K.C., and *James O'Connor*, for the appellant.

Henry, K.C., and *Dunne*, for the respondent (J. B. Moriarty).

The Solicitor-General and *Morphy*, for the Crown.

FITZ GIBBON, L. J.:—

I shall first deal with the point mentioned last by Mr. O'Connor. He says that his client has a right of appeal to the Recorder from the refusal of the certificate by the Divisional Justices, and that an adverse decision of this appeal would deprive him of that right. We do not decide that this is so; but as the case came before the King's Bench, and from it to this Court, we consider that the point does not arise. The question of the appeal to the Recorder was not raised in this proceeding, and it would have been inconsistent with what each party claimed.

The litigation commenced by the application by the relator (Moriarty) to prohibit one of the two Divisional Justices who heard the case from giving a certificate, signed only by himself, ignoring the fact that he was only one member of an equally divided Court. That was followed by the counter proceeding of the appellant Bourke, who applied for a mandamus in effect to compel the other

Divisional Justice to join in signing the certificate. The King's Bench Division granted the prohibition, and refused the mandamus; and from that decision these appeals are taken. Therefore the proceeding never involved any question of appeal to the Recorder. We cannot decide whether such an appeal lies or not. If the applicant is entitled to it, we are not to anticipate that he will not get it.

Upon the main question I shall read a passage from the judgment of the Lord Chief Baron, omitting some suggestions of doubt, and I take leave to appropriate it as my own:—

> "The withdrawal of the objections to Mr. Bourke's application for a certificate was a valuable consideration for the contract made by him. I consequently hold that there was evidence of a valid contract between Mr. Bourke and the objectors in 1901, to remove his extended bar, and conduct his premises for the future in accordance with the former undertaking. That contract was entered into in a public Court, and so as to be capable of becoming notorious, and the intentional and habitual conduct of his licensed premises in breach of that undertaking—whether such breach was contemplated when the contract was entered into, or whether it was only subsequently determined on—was, in my opinion, a continuing and deliberate legal wrong to the public (who had been represented by the objectors), in a matter in which that public had, and are recognised by the Licensing Code as having, an interest. I cannot say that such conduct is not capable of affecting and derogating from the good reputation as a licensed publican which, on the evidence and admissions, I must hold that Mr. Bourke would otherwise have had. Upon the whole, then, I am of opinion that there was evidence to sustain Mr. Swifte's decision; and consequently that the cause shown against the rule for the mandamus should be allowed, and the rule discharged; and that the cause shown against the rule for prohibition should be disallowed, and that rule made absolute."

I wish to add, for myself, that although the conduct of Bourke in breaking his undertaking was directly connected with his trade as a publican, and was therefore calculated to affect his character for the purposes of the Licensing Acts, I do not consider that the estimate of good character required under those Acts is to be limited to character as a publican. The licensing authority is not confined, in determining the question of character, to the consideration of matters relating to the sale of liquor. In the case of a "new beginner" this is obvious, because the applicant in

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such a case can have no previous character or reputation in the trade. There is nothing in *Leader* v. *Yell* (1) to conflict with this view. There six qualified inhabitants had certified that the applicant was a person of good character: he was prosecuted and convicted for unlawfully using this certificate knowing it to be false. He was living in a state of concubinage, and Williams, J., expressly said (p. 594) that there was evidence which would have warranted the magistrates in coming to the conclusion that he was not a person of good character, but the conviction was quashed on the ground that it did not follow that he must necessarily have known that the certificate was false, as character meant general reputation in the estimation of his neighbours; his conduct might possibly admit of some palliating circumstances; and there was no evidence of open and notorious profligacy. That case has nothing to do with the measure or quality of the evidence which will justify the tribunal on which the duty is thrown of determining whether an applicant is of good character, in refusing to certify that he is so. That is the only question in this case, and it is answered by the passage which I have adopted from the judgment of the Lord Chief Baron.

If I had to decide the matter, I should be inclined to agree with Mr. Swifte. Twice, if not three times Bourke undertook to carry on his business in a particular way, and he got his license by promising to do so. On the last occasion he gave that undertaking to the representatives of the inhabitants who were opposing his application, presumably in what they conceived to be the interest of public order and temperate living in the neighbourhood, and on the faith of his promise they withdrew their opposition. Nevertheless, he deliberately and openly violated the undertaking so solemnly given, and continued to do so for a whole year. Everyone who knew of the promise, and who saw it thus publicly and persistently broken, must have had his estimate of Bourke's character unfavourably affected, and I think that the refusal to certify, under such circumstances, that he was a person of good character, at least within the meaning of the Licensing Acts, was reasonable. Therefore a mandamus so to certify notwithstanding cannot be granted, and the appeal fails on that ground.

(1) 16 C. B. (N. S.) 584.

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But a further objection has been raised against the appeal. It is said that one of the conditions on which the original license was obtained was the payment of a large sum of money into Court, to be placed at the disposal of the licensing authority—not for the benefit of the applicant or of anyone interested in the transaction—but to be applied, at the discretion of the Recorder, for the benefit of some one else, on some future occasion, in or towards buying up some other license, for the purpose of extinguishing it. Imposing such a condition upon an applicant for the exercise of the judicial discretion or power of granting licenses raises a most serious question as to whether a license granted in consideration of such a payment is not void *ab initio*. The Chief Baron has observed that a decision in this case based on that ground might affect valuable rights and property of people not before the Court. But we feel it to be our duty—all of us—to express our opinion judicially that, if such payments have been received as the condition of granting licenses or certificates under the Licensing Acts, *fieri non debuit*. It ought not to have been done, and it ought not to be done. How far persons who have heretofore been parties to payments of this sort can be helped on the principle *fieri non debuit, factum valet*, is a question which, for the reason given by the Lord Chief Baron, we abstain from now discussing, and we express no opinion about it. But any persons who join in such transactions after the judgment of this Court in this case may find themselves in a difficult position.

As regards costs, the inhabitants of the locality were represented on both these appeals by the respondent Moriarty. He was a *legitimus contradictor*. The Crown got notice, and has come in. But in the King's Bench the counsel for the Crown declined to open the question of illegality, while the whole case was argued by the counsel for Mr. Moriarty. Besides, the Crown in such matters declines to pay costs when the decision is adverse, and it is not our practice to give more than one set of costs to parties in the same interest. We accordingly give the Crown no costs; but we dismiss each appeal with one set of costs, to be paid by the appellant to the relator in the prohibition matter, and to the respondent Moriarty on the mandamus.

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WALKER, L. J. :—

I concur. I desire to add expressly that I entirely agree with Lord Justice Fitz Gibbon in what he has said as to the payment of money into Court as a condition for the granting of the license. Such a condition is illegal, and may lead to great difficulties and serious consequences.

HOLMES, L. J. :—

It is difficult to lay down a positive rule as to the precise nature of the conduct by which a person who was previously of good character may be said to lose his right to be so called. Good character is a relative term.

Many people would think it hard that a person otherwise blameless should be said not to be of good character on account of a single act of drunkenness. Again, many persons would be surprised to hear that a man had not lost the right to be said to be of good character by participating in a criminal fraud. Whether a man is of good character or not is a question of fact, as to which different minds may arrive at different conclusions.

We have to consider here whether there were any circumstances which would justify Mr. Swifte in declining to give to the applicant a certificate that he was of good character. In the matters proved before the magistrates there is one which stands out pre-eminent. The applicant had pledged himself in Court in the most solemn way to carry on his business in a particular way if he was granted a license. He broke that pledge in a very deliberate manner. I think this circumstance justified Mr. Swifte in refusing the applicant a certificate that he was of good character.

I wish to add my entire concurrence in the views expressed by my colleagues as to the practice of lodging money in Court as a kind of condition precedent to obtaining a license. I have no doubt such a condition is illegal, and as the practice may lead to serious consequences, the sooner it is abandoned the better.

Solicitor for Jeremiah Bourke: *Roger Greene.*
Solicitor for J. B. Moriarty: *H. J. M'Cormick.*
Solicitor for the Crown: *Sir Patrick Coll, C.B.* G. Y. D.

PATRICK MURPHY, APPLICANT; COUNTY COUNCIL OF THE COUNTY CORK, RESPONDENTS (1).

Appeal.
1902.
Jan. 21.

Local Government—Compensation for maiming—Application by peace officer—Exertions to bring disturbers of public peace to justice—Motive for the injury done—Grand Jury Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106—*Local Government* (*Ireland*) *Act*, 1898, *sect.* 5.

The applicant and another constable, while engaged in patrol duty, arrested two men on the charge of larceny of a goose, which was found in their possession, and proceeded to take the prisoners to the barracks. On the way thither the prisoners offered resistance to the constables, and escaped from custody. The applicant pursued the prisoners, and succeeded in retaking one of them, who, on his being recaptured, inflicted on the applicant injuries which incapacitated him from acting as constable, and constituted maiming within the meaning of the statute. Both prisoners were subsequently tried and convicted for the larceny of the goose and the assault on the constables. The applicant sought to obtain compensation for the injuries under the Local Government (Ireland) Act, 1898, section 5:—

Held, that the applicant was not, within the meaning of section 106 of the Grand Jury Act, 1836, maimed on account of his exertions as a peace officer to bring disturbers of the public peace to justice, and that therefore he was not entitled to compensation for his injuries.

APPEAL by way of special case pursuant to the statutory rules under the Local Government Act, 1898 (section 5), respecting appeals to the Judge of Assizes in cases of criminal injuries.

The special case was stated by the Right Hon. the Lord Chief Justice on hearing an appeal from the County Court Judge of the West Riding of Cork.

The case was as follows:—

1. This case came before me at the Cork Summer Assizes, July, one thousand nine hundred and one, on appeal from a decree dated the twenty-fourth day of April, one thousand nine hundred and one, made by the County Court Judge of the West Riding,

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

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granting the applicant one hundred and seventy pounds compensation to be raised off the county at large.

2. The application was one for compensation for a peace officer maimed on account of his exertions to bring disturbers of the public peace to justice under section 106 of the 6 & 7 Wm. 4, c. 116, as extended, altered, and adapted by the Local Government (Ireland) Act, 1898, sect. 5, and the Local Government (Adaptation of Irish Enactments) Order, 1899.

3. On the morning of the sixth January, one thousand nine hundred and one, about two a.m., the applicant Patrick Murphy, and another constable Jeremiah Keane, being on patrol duty in the town of Skibbereen, arrested two men named John Sullivan and James Sullivan on the charge of the larceny of a goose which was found in the possession of John Sullivan. The constables, with these two men in custody, had proceeded some distance on their way to the barrack, when John Sullivan, whom the applicant was holding, became very violent and offered forcible resistance to the applicant. Constable Keane coming to the applicant's aid, his (Keane's) prisoner James Sullivan joined his brother John in resisting the two constables. Both prisoners assaulted the two constables and broke away from them. The constables went in pursuit. About fifteen minutes after the escape of the Sullivans, and about six hundred yards from the place where it occurred, the applicant came up with them again. James Sullivan struck applicant in the face and got away. Applicant then grappled with John, who violently resisted him, and with his belt struck applicant several blows on the mouth, face, and body. In the struggle the applicant was brought to his knees, and received the injuries for which compensation is now sought; he held on to Sullivan, and with the assistance of the other constable lodged him in the barrack.

4. The Sullivans were subsequently tried and convicted both for larceny of the goose and for the assault on the constables.

5. The injuries received by the applicant were serious and permanently incapacitated him from continuance in the force. It is admitted that they constitute maiming within the meaning of the Act.

It was contended on behalf of the County Council that the

injuries received under the foregoing circumstances could not be held to amount to injuries received on account of applicant's exertions to bring disturbers of the public peace to justice, the grounds of this contention were:—

1. That a person who had committed larceny was not a disturber of the public peace within the meaning of the statute.

2. That the escape, although effected by violence from legal arrest and lawful custody, was not a disturbance of the public peace within the meaning of the statute.

3. That the statute did not contemplate compensation for injuries received from the actual disturbers of the peace inflicted by them on a constable whilst engaged in the act of bringing them to justice.

The question for the Court is, whether there was evidence on which I could find, and whether it was competent for me to hold, that the injuries were received by the applicant on account of his exertions to bring a disturber of the public peace to justice.

If this question is answered in the affirmative, the decree below is affirmed; if in the negative, it is to be reversed.

Matthew J. Bourke, K.C., and *Sheehan*, for the applicant.

R. Brereton Barry, K.C., and *D. M'C. Mahony*, for the County Council.

[They cited Dalton's Justice of the Peace, p. 9; Bacon's Abridgment, vol. 4, Indictment, § 7; Hale's Pleas of the Crown, p. 581; *In re Nolan* (1); *Mayor of Portsmouth* v. *Smith* (2).]

LORD ASHBOURNE, C.:—

This case comes before us on a case stated under the provisions of the Local Government Act, 1898, section 5, by the Lord Chief Justice, upon the hearing of an appeal from the decree of the County Court Judge of the West Riding of Cork, awarding to the applicant, a police constable, the sum of £170 compensation for injuries received by him in the performance of his duties, such compensation to be raised off the county at large.

(1) 24 I. L. T. & S. J. 623. (2) 10 App. Cas. 364.

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Lord Ashbourne, C.

The application is founded upon section 106 of the Grand Jury Act (6 & 7 Wm. 4, c. 116) as modified by the Local Government (Adaptation of Irish Enactments) Order, 1899. We have also to bear in mind the repealed section 5 of the 50 Geo. 3, c. 102; for its provisions, though repealed, give a clue to the nature and scope of the legislation. The general idea of this code commonly held is, that it was framed to give compensation for injury received in consequence of exceptional ill-will incurred by officers on account of their activity in the performance of their duty. That was always my idea during my professional life. We are asked now to read the section more closely and critically, and to see if it is capable of being stretched so as to include the facts of this case.

Two constables, of whom the applicant was one, arrested two men called Sullivan for the larceny of a goose, which was in the possession of one of the prisoners. The prisoners assaulted the constables and effected their escape. They were pursued by the constables and recaptured. In the struggle which resulted on the re-arrest serious injuries were received by the applicant which form the foundation of the application for compensation. The case came before the County Court Judge, who acceded to the claim of the constable, and awarded him £170 compensation. The case then came before the Lord Chief Justice on appeal, and on its being fully argued the learned Judge, finding that the contention of the constable was of a far-reaching character, deemed it right to state this case for the consideration of this Court.

The question turns upon the facts above stated. It has been presented to us with great clearness and force, on behalf of the County Council, by Mr. Barry, who relied upon the passage in Hale (1 P. C., p. 581) as showing that the arrest and re-arrest of the Sullivans was all one transaction. He pointed out that the Sullivans were arrested for an ordinary larceny, that they thereupon assaulted the constables with a view to thereby effecting their escape, that they succeeded in getting away from the constables for a time, and that in the course of their being re-arrested the applicant sustained these injuries. I agree with Mr. Barry that, on the facts stated here, the arrest, the struggle, the escape, the re-arrest, and the assault, were all incidents of an ordinary character in the arrest and custody of a prisoner for larceny. On

these facts I see nothing to show the existence of that exceptional ill-will roused by the constable's activity to which I have referred as being within the contemplation of the Act of Parliament.

Turning to the words of the enactment within which the applicant seeks to bring the case one finds as follows:—"If it shall appear . . . that any magistrate or other peace officer shall be murdered or maimed on account of his exertions . . . to bring disturbers of the public peace to justice . . . it shall be lawful for the County Court to make a decree for such sum, etc." The case turns almost exclusively upon the meaning of the words "on account of his exertions to bring disturbers of the public peace to justice." It is urged that the peace officer here was maimed on account of his exertions to bring these men as disturbers of the public peace to justice. That contention at once raises a question as to the true construction of the words "on account of his exertions." Can it be said that this policeman received these injuries on account of his exertions to bring disturbers of the public peace to justice? It seems to me that the language of the statute requires that the motive for the injury should be found in the exertions of the constable to bring disturbers of the peace to justice. The applicant was endeavouring to bring a man who stole a goose to gaol. How can it be said that the motive for committing the injury was supplied by the exertions of the constables to bring the man to justice? No doubt the constables met with violent resistance, as sometimes happens in cases where a prisoner is arrested. But the motive of this resistance, which caused the injury, is not to be traced to any special feeling of ill-will towards the constables for bringing the man to justice, but to the ordinary desire to escape from arrest. In my opinion, on the facts of this case, it cannot be said that it was on account of his exertions to bring a disturber of the public peace to justice that the applicant was maimed. I do not seek to lay down any general rule. But I do not see how this case can, on its facts, be held to come within the words of the section.

Mr. Bourke was forced in his argument to contend that this clause did not apply only to a special class of cases, but might apply to any constable taking any prisoner to gaol upon any charge if the prisoner maimed him. That is an immense contention, and

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one that would suggest, if it were well founded, that this section would be found in the ordinary law of the country, and not in special legislation of the kind where it is introduced.

The short ground of my judgment is, that the facts here do not come within the section, and therefore no compensation can be given under its provisions.

FITZ GIBBON, L. J. :—

I agree that the question put on this case must be answered in the negative. But we must be careful in giving our reasons, because the case states the contentions of the parties, and it does not follow that we adopt the contention of the party in whose favour we decide.

The Lord Chief Justice states the question thus :—"Whether there was evidence on which I could find, and whether it was competent for me to hold, that the injuries were received by the applicant on account of his exertions to bring *a disturber* of the public peace to justice?" Although he speaks of "a disturber" in the singular, and the Act speaks of "disturbers" in the plural, the distinction is immaterial here, because there were two offenders, and both were brought to justice.

Three contentions of the County Council are stated on the case. I do not accept any of them without qualification :—

(1) "It was contended that a person who had committed a larceny was not a disturber of the public peace within the meaning of the statute." It may be conceded that a mere larceny might not be a disturbance of the public peace within the statute. But a man who has committed a larceny may also disturb the public peace and be brought to justice for it.

(2) "That the escape, although effected by violence from legal arrest and lawful custody, was not a disturbance of the public peace within the meaning of the statute." An escape effected by violence from lawful custody might be a typical case for the application of the Act. Here the case expressly states that both prisoners had assaulted the constables before the arrest in the resistance to which the injuries were inflicted, and we must take it, therefore, that the prisoners committed two offences, the first of which had taken place before that arrest, and had included an actual breach of the peace.

(3) "That the statute did not contemplate compensation for injuries received from the actual disturbers of the peace inflicted by them on a constable whilst engaged in the act of bringing them to justice." We all reject this proposition as too wide. If prisoners arrested for any crime afterwards, while being brought to justice, become participators in a disturbance of the peace which is otherwise within the Act, it is immaterial whether they had or had not previously committed another offence.

It is not on any one of these grounds that, in my opinion, the applicant fails. At the time of the second arrest, the case, on my reading of it, expressly states that both the prisoners were "disturbers of the public peace" as well as stealers of a goose. But the Act does not apply unless the maiming was done *on account of the exertions of the constable* to bring them to justice. The test, in my opinion, is whether the motive of the maiming was special malice towards the constable inspired by his exertions. Distinct things may happen so rapidly, or may be so connected, as to form but one transaction. There may be—First, a disturbance of the peace; secondly, exertions by a peace officer to bring the offender to justice; thirdly, maiming of the officer. But to entitle him to compensation by presentment, the motive for the maiming must be his exertions. The test under the first part of the section, dealing with a witness, is whether he was injured *because* he gave evidence, or *to prevent him* from giving evidence. So under the second part, relating to the constable, the test is whether he was maimed in retaliation *for having done his duty*. The case here expressly connects the assault upon the applicant with the arrest, and makes it an incident of it, but it does not even suggest that the mind of either prisoner was actuated in the assault by any feeling or motive referable to the constable's *previous* exertions to bring him to justice. It was simply the case of a constable hurt by a violent prisoner in the course of arresting him. Mr. Bourke was driven to contend that "on account" was equivalent to "in the course." This was not the intention, and it is not the meaning, of the statute: the applicant fails, though the injuries were inflicted upon him in the performance of his duty, because they were not actuated by that special malice which alone gives the right to compensation by presentment.

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WALKER, L. J. :—

I concur. This section is a branch of the law of compensation for malicious injury and not an insurance clause for policemen. It deals with cases where ill-will has been shown to certain persons because they have been exceptionally zealous in maintaining the law—either giving evidence against persons charged with an offence against the public peace or using exertions by which disturbers of the public peace have been brought to justice. The section consists of two branches—the first giving compensation to persons injured on account of giving such evidence, and the second giving compensation to a peace officer maimed because he has shown zeal in bringing disturbers of the public peace to justice. The section does not include the case of an injury inflicted on a policeman while bringing a thief to the barracks. The use of the word "disturbers" in the plural is of importance as showing the scope of the section. The class of criminals embraced in that description proves the intention of the Legislature. We have to ascertain whether as a fact the applicant was injured on account of his exertions to bring disturbers of the public peace to justice. There is no evidence of malicious motive in this case. These injuries were sustained in the course of bringing a thief to the barracks. The intention of the person who inflicted them was solely to escape from what at law was a continuous arrest. I do not think it necessary to define what is meant by the phrase "disturbers of the peace."

HOLMES, L. J. :—

Mr. Bourke has frankly admitted that the result of establishing the proposition for which he has contended would be that every peace officer maimed, by a person whom he is in the act of arresting, is entitled to compensation to be levied off the county or district in which the injury is received. Amongst the risks to which a policeman is exposed is that of injury from a prisoner in the efforts of the latter to escape from custody; and it is quite right that he should be compensated for this work either by the amount of his pay and pension or in some other way; but the section under which Murphy's application is made deals with a

wholly different subject-matter. It is one of several enactments passed with the object of checking certain kinds of malicious injury to person and property by making the pockets of the ratepayers of the district responsible, and by thus giving them an interest in putting a stop to such offences. It is apparent from the language of section 106 of the Grand Jury Act, as well as from the Statute of 1810, from which this section is copied, that the mischief against which it was directed was the aversion with which the enforcement of the criminal law has always been regarded in this country. The fact of a man having given evidence in a criminal case might expose him to outrage; and magistrates and peace officers whose duty it is to bring offenders to justice often become objects of popular indignation by reason of their activity.

When a witness on account of his evidence, when the magistrate or police officer on account of his efforts, is maimed or murdered, the section applies. The words "efforts in bringing disturbers of the public peace to justice" seem to point to general efforts, but would of course include efforts in a particular case, and extend to efforts as well in the work of detection and procuring evidence as in the way of arrest. But I do not see how the section can be extended to injuries received by a policeman in a case like the present, in which there is no evidence that the injuries, although inflicted on the constable in the course of his duty, were inflicted on account of the efforts made by him in bringing offenders to justice. The motive under which the prisoners acted was purely personal to themselves—a desire to free themselves from detention. In these circumstances, the compensation claimed cannot be awarded.

Solicitor for the applicant: *Fitzmaurice.*
Solicitor for the respondents: *Exham.*

G. Y. D.

K. B. Div. 1903. April 28.

THE NEWRY SALT WORKS CO., Limited, *v.* ALLAN MACDONNELL, JOSHUA TOWNSEND, JOHN EDGAR CONNOR, and FELIX O'HAGAN (1).

(1900. No. 15,817.)

Costs—Co-defendants—Contribution.

Where one of several co-defendants who are decreed to pay the plaintiffs' taxed costs of action pays the entire of such costs, he is entitled to obtain contribution in respect thereof from the other co-defendants, in the action, and without an independent proceeding.

Dearsly v. *Middleweek* (18 Ch. D. 236) considered.

Motion on notice. The action was one to recover the sum of £2316 13*s.* 4*d.* for money lent by the plaintiffs to the defendants. Judgment in default of defence was entered against the defendant Macdonnell. The other three co-defendants entered separate appearances, and were represented by separate solicitors and counsel at the trial of the action, when judgment was given for the plaintiffs for the amount sued for, together with their costs of suit on taxation. The amount of the judgment debt was duly paid by the defendants Connor, O'Hagan and Townsend, according to their respective liabilities, but the defendant Connor, in order to avoid execution being issued against him by the plaintiffs, was subsequently compelled to pay the entire of the plaintiffs' taxed costs of suit, together with the costs of a motion to review the Taxing Master's certificate of taxation, and now applied for an order that the defendants O'Hagan and Townsend should contribute and pay to him their respective shares of the amount so paid by him in respect of the plaintiffs' taxed and certified costs in the action.

S. L. Brown, K.C., and *Cusack*, for the defendant Connor, were stopped by the Court.

(1) Before Palles, C.B., and Gibson, J.

Dromgoole, for the defendant Townsend :—

The only question raised at the trial was as to the liability of Connor, and if application had been made at the trial, the judgment would have provided that he should bear the entire costs. In *Wilson* v. *Thomson* (1), which was a suit for specific performance against two defendants, a declaration was inserted in the decree that as between the two defendants, the one who was chiefly to blame ought to pay the whole of the costs. The Court will not in general give directions for contribution between defendants *inter se* : *Fletcher* v. *Green* (2).

In *Pitt* v. *Bonner* (3) the decree for contribution was by consent. The decree in *Staples* v. *Smith* (4) provided that each defendant should be liable only for his own costs. Here there was no application at the trial to apportion the costs, and each defendant accordingly became liable for the whole debt. In *North* v. *Gurney* (5) the order that the defendants should pay the costs of the suit was made without prejudice to any question that might arise between them as to contribution thereto. One of several co-defendants who are decreed to pay costs of an action cannot by an independent proceeding obtain contribution in respect of such costs against the others: *Dearsly* v. *Middleweek* (6). [He also cited *Archbishop of Dublin* v. *Trimbleston* (7); *Michel* v. *Bullen* (8); *Lockhart* v. *Reilly* (9).]

D. S. Henry, K.C., for O'Hagan.

S. L. Brown, K.C., in reply, referred to Beames on Costs, p. 117.

PALLES, C.B. :—

This is a clear case. The effect of the judgment was to make these various defendants joint debtors for the costs when ascertained, and as a matter of course when one of several joint

(1) L. R. 20 Eq. 459.
(2) 33 Beav. 513.
(3) 1 Y. & C. C. C. 670.
(4) 6 Ir. Eq. R. 211.
(5) 1 J. & H. 509.
(6) 18 Ch. D. 236.
(7) 13 Ir. Eq. R. 98.
(8) 6 Price, 87.
(9) 25 L. J. Ch. 697.

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debtors pays the whole amount of the debt, he is entitled to contribution from the others.

The only question that really has to be determined is, whether this is a right capable of being enforced in the action itself, or whether it must be asserted in an independent proceeding.

There is a decision of Mr. Justice Fry in *Dearsly* v. *Middleweek* (1) that goes to the extent that the right to contribution cannot be enforced in an independent proceeding, and in giving that decision the learned Judge purports to follow a decision in the Court of Appeal in England: *Real and Personal Advance Company* v. *M'Carthy* (2).

My own opinion is that the words of that case convey something different from what was really intended to be decided. I think the real reason why the Court there was unwilling to establish the right in an independent proceeding was because such proceeding was unnecessary, not because there was no jurisdiction to entertain it.

However that may be, this being a plain right between co-defendants, I can see no reason why, at all events since the Judicature Act, it should not be enforced in the action, and without an independent proceeding. It is said the judgment did not provide for any apportionment. This was not necessary; the effect of the judgment was to render the costs a joint debt; the plaintiffs in the action were not interested in the question of contribution, but the moment the payment was made, the right arose in the defendant Connor, and I can see no reason why, according to law or common sense, that right should not be enforced in this action without an independent proceeding. Each of these defendants must pay the costs jointly, and the defendant Connor must have the costs of this motion.

GIBSON, J., concurred.

Solicitor for Connor: *R. A. Mullan.*
Solicitor for Townsend and O'Hagan: *A. Gartlan.*

R. ST. J. C.

(1) 18 Ch. D. 236. (2) *Ibid.* 362.

PIM, BROTHERS, LIMITED, *v.* THOMAS COYLE AND MARGARET COYLE (1).

K. B. Div. 1903. April 30.

(1903. No. 3781.)

Practice—Co-defendants—Judgment in default of appearance against one—Subsequent procedure against the other—Gen. Orders XIII., Rule 4, *and XIV., Rule* 5.

A plaintiff, by entering judgment in default of appearance against one of two joint defendants, does not abandon his right to proceed to judgment against the other defendant.

APPLICATION on behalf of the plaintiffs under Gen. Ord. XIV., R. 1, for liberty to enter final judgment for the sum of £200 due on foot of a joint guarantee given by the defendants to secure a debt, the particulars of which were indorsed on the writ of summons. The plaintiffs had on the 21st April, 1903, obtained judgment in default of appearance against the defendant Thomas Coyle, but no execution had been issued on foot thereof.

J. Pim, for the plaintiffs:—

The judgment already obtained is not a bar: Gen. Ord. XIII., R. 4, and Gen. Ord. XIV., R. 5. A similar right to proceed existed under section 97 of the Common Law Procedure Act, 1853: see *Seymour* v. *Donnelly* (2). *Montgomerie* v. *Ferris and Brown* (3) decided that under Gen. Ord. XII., R. 4, of the Judicature Act a plaintiff did not abandon his rights against one of two joint defendants by reason of his having entered judgment and issued execution against the other. The plaintiff cannot be paid twice over, but until he is paid the entire debt the action is not stopped: *Weall* v. *James* (4). *M'Leod* v. *Power* (5) is distinguishable. Byrne, J., there says that the rules provide in two cases for the

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.
(2) 2 I. Jur. (N. S.) 256
(3) 20 L. R. Ir. 282.
(4) 68 L. T. 515.
(5) [1898] 2 Ch. 295.

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non-observance of the old rule as laid down in *King* v. *Hoare* (1), namely, when the plaintiff obtains judgment under Ord. XIV., or where he obtains judgment by reason of default on the part of one of the defendants. The present case comes under the latter exception.

P. Law Smith, for the defendant Margaret Coyle, relied upon *King* v. *Hoare* (1).

THE COURT ordered that the plaintiffs be at liberty to sign final judgment in the action against the defendant Margaret Coyle for the amount indorsed on the writ, with costs of suit, including the costs of this motion.

Solicitors for the plaintiffs: *Molloy & Molloy.*
Solicitor for the defendant Margaret Coyle: *L. C. P. Smith.*

R. ST. J. C.

K. B. Div. 1902. Dec. 3, 5.

GALABRUN *v.* BRUCE, SYMES AND WILLIAMS (2).

(1902. No. 12,028.)

Practice—Interpleader—Service out of the jurisdiction—General Orders XI. and LVII.

Where an action is "properly brought against some other person duly served within the jurisdiction," the Court will give liberty to serve an interpleader summons in that action upon a third party resident out of the jurisdiction.

R., a person resident out of the jurisdiction, had handed over certain negotiable securities to B. and others, who were stockbrokers in Dublin, with instructions to have them sold. B. sold the securities in due course, but payment having been stopped, they remained in B.'s hands. Afterwards G., who was resident in France, claiming that the securities were her property, and that they had been stolen from her, instituted an action against B. to recover the securities or their value. B., desiring to have it determined who was the owner of the securities, applied to the Court for liberty to serve notice of an interpleader summons in the action on R. out of the jurisdiction:—

Held, that Rule 10 of Gen. Ord. XI., to which there is no corresponding Rule in the English Orders, applies to interpleader summonses, and that the

(1) 13 M. & W. 484. (2) Before PALLES, C.B., and BOYD, J.

interpleader summons in this action might be served out of the jurisdiction on R., in accordance with the general provisions of the Order.

EX PARTE APPLICATION by the defendants in the action for liberty to serve notice of an interpleader summons, issued in the action, upon Eugene Rousseau, a person resident out of the jurisdiction, and not a party to the action. The action was brought by Marie Joseph Galabrun, who resided in France, against Bruce, Symes & Williams, stockbrokers, Dublin, to recover possession of certain securities or their value. In the month of April, 1901, Eugene Rousseau came to the head office of the Bank of Ireland, and expressed a desire to have a number of foreign securities sold for the purpose of enabling him to open business in Grafton-street. He was informed that the sale of Stock did not come within the scope of the business of the Bank itself, but that the firm of Bruce, Symes & Williams, the defendants, were at that time acting as stockbrokers to the Bank. Thereupon, he called upon the defendants at their place of business, and placed the securities in their hands to be sold. The defendants, believing that the securities were the property of Eugene Rousseau, proceeded to realize them as directed.

The defendants sold all the securities in due course, and forwarded the bonds to their London agents for delivery to the purchasers. They subsequently received notice that payment of the bonds had been stopped; thereupon the bonds were returned to them, and were still in their hands. In accordance with the rules of the Stock Exchange, the defendants were obliged to buy bonds to replace those of which payment had been stopped.

Rousseau told the defendants that he was residing at No. 118, Lower Baggot-street, Dublin, and they subsequently received three letters from him—purporting to come from Brussels, May 14th, 1901; 11, Rue St. Remy, Liege, June 27th, 1901; Liege, July 6th, 1901—stating that at present he was travelling, and that meantime the proceeds of the sale of the bonds should be invested in English Consols. Since the receipt of the last-mentioned letter the defendants had received no further communications from Rousseau, and had no information as to his present whereabouts.

Towards the end of 1901 the defendants were informed, by a communication from the Dublin Detective Office, that criminal proceedings had been instituted, in which it was alleged that the

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securities had been stolen by Rousseau, and that a "Commission Rogatoire," in the nature of a commission to take evidence, had been issued by the Government of France, and had been duly transmitted, through the Home Secretary, to the Chief Magistrate of the city of Dublin, directing him to take depositions of certain witnesses in Dublin. The defendants attended this commission, and stated all the facts in their possession regarding the matter. Subsequently the present action was brought.

The defendants now swore that they were ignorant of the plaintiff's right to claim these securities, and they declined to hand them over, but were prepared to lodge them in Court to abide the result of the interpleader proceedings.

Gaussen, in support of the application, referred to *Keane* v. *Crozier* (1); *The Credits Gerundeuse, Limited*, v. *Van Weede* (2); *In re Busfield* (3); *Whitley* v. *Honeywell* (4); *Berkely* v. *Thompson* (5); *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (6); and the Annual Practice, 1903, pp. 804, 805.

Dec. 5

PALLES, C. B.:—

In this case an interesting question arises. It is an application for liberty to serve notice, out of the jurisdiction upon one Rousseau, of an interpleader summons in the action.

It appears that some time since Mr. Rousseau applied to the defendants, Messrs. Bruce & Symes, stockbrokers, in Dublin, to sell certain negotiable securities; that those securities were not sold, and that they are now in the hands of the defendants; that Mr. Rousseau has left Ireland, and is now somewhere abroad. It has been alleged by the plaintiff, who is resident in France, that those securities were stolen from her, and this action has been brought by her against the defendants for the purpose of recovering from them either the securities or their value. The application we have now to deal with is one by the defendants, for liberty to issue an interpleader summons, and to serve notice of it out of the jurisdiction upon Mr. Rousseau.

(1) 27 I. L. T. R. 81.
(2) 12 Q. B. D. 171.
(3) 32 Ch. D. 123.
(4) 24 W. R. 851.
(5) 10 A. C. 45.
(6) [1891] 3 Ch. D. 457.

Some cases were cited by Mr. Gaussen when moving the motion; but I do not think it necessary to enter into them at length, further than to say that in the year 1893 this Court decided, in *Keane* v. *Crozier* (1), that there was jurisdiction to substitute service upon a claimant in Australia of notice of an interpleader summons under somewhat similar circumstances. It was, however, suggested that there were doubts as to that decision, in consequence of cases subsequently decided in England, and we were in particular referred to *In re Busfield* (2), *Berkeley* v. *Thompson* (3) (decided in the House of Lords), *The Credits Gerundeuse, Ltd.*, v. *Van Weede* (4) and *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (5) (decided in 1891). I myself mentioned a case in which many of those authorities were reviewed in this Court: *Spence* v. *Parkes* (6).

Were we to decide this motion according to the English Rules, I think it would be impossible to support the decision of the Queen's Bench in 1893; but, since the argument, our attention has been called to a distinction of great importance between our Order XI. and the English Order XI. as to service out of the jurisdiction. In England it was held that there was no power, under their Order, to serve an originating summons out of the jurisdiction; but I find that there is a Rule in our Irish Order to which there is no corresponding provision in the English Order. It is Rule 10:—"The Rules of this Order, so far as applicable, shall apply to originating summonses and petitions, and other originating proceedings."

The question, therefore, is, whether this interpleader summons, which I treat as being, so far as regards Mr. Rousseau, an originating proceeding, can be served under the provisions of our Order XI. The only clause of Rule 1 of that Order that applies to it is in these words:—"Service out of the jurisdiction may be allowed whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Now, were we to treat this motion as an application for

(1) 27 I. L. T. R. 81.
(2) 32 Ch. D. 123.
(3) 10 A. C. 45.
(4) 12 Q. B. D. 171.
(5) [1891] 3 Ch. 451.
(6) [1900] 2 I. R. 619.

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Palles, C.B.

interpleader under the general jurisdiction of the Court, it would appear to me that the Rule would not apply, because the suit would not be one "properly brought against some other person duly served within the jurisdiction." The only other defendant in that suit would be the plaintiff here, and she is resident in France. But then comes the question, What is the nature of an interpleader proceeding under Order LVII? I think it quite clear that it is a proceeding *in the action*, and that the intention of the Acts relating to the statutable proceeding by interpleader, and of the Judicature Act, is that all rights shall, as far as possible, be determined in the same action. Before the Interpleader Acts the course for the defendants here to have adopted would have been to file a bill in Chancery against the plaintiff in the present action and Mr. Rousseau calling upon them to interplead. The effect of the Interpleader Act was to render unnecessary any such proceeding in Chancery, and to enable the whole matter to be determined in the action; and the intention of the Judicature Act was to render it not only unnecessary, but improper, that the independent proceeding should be resorted to. Since that Act the rights of every person interested in the subject-matter of the action ought to be determined in the one action. There, therefore, is an action pending here between one of the claimants to these securities, the plaintiff, and the defendants; and, having regard to the Judicature Act and the Interpleader Act, the defendants are entitled to have it decided *in this action* (before a judgment can pass against them at the suit of the plaintiff), whether she or Mr. Rousseau, from whom the defendants received the securities, is the real owner of them. The action in which they are so entitled to have this question decided is one in which the applicants are defendants and they are resident in Ireland. The case is therefore within Rule 10 of Order XI. Upon that ground we give liberty to serve notice of the summons out of the jurisdiction. We have already indicated the mode of service.

BOYD, J., concurred.

THE Order of the Court directed service on Rousseau to be effected in the following manner:—"And it is further ordered by the Court . . . that service of notice of the said summons to be made upon Eugene Rousseau by sending, in a registered letter, true copies of

the said notice of the said summons and of the order, addressed to him at his last-known place of abode, 11, Rue St. Remy, Liege, Belgium, and also by inserting an advertisement of said notice and this order in each of the following newspapers, viz. *Journal de Liege*, published in Liege, Belgium, the *Gazette du Midi*, published in Marseilles, in France, and in the *Times*, London, be good service of the said notice on the said Eugene Rousseau."

Solicitor for the defendants: *John A. French.*

J. L.

GILL *v.* M'DOWELL (1).

Contract of sale—Sale of hermaphrodite animal—Parties not ad idem*—Fraud.*

The defendant sent three head of cattle to a fair for sale, a bullock, a heifer, and an animal which from one point of view appeared to be a bullock, and from another a heifer, and which was, in fact, a hermaphrodite. The three animals were bought at £10 5*s.* each by the plaintiff, a cattle dealer. No warranty was given, and nothing was said as to the sex of the animals; but the plaintiff bought under the belief that he was buying either a bullock and two heifers, or a heifer and two bullocks. The defendant knew of the malformation of the hermaphrodite, and knew that the plaintiff would not have purchased it had he known of the malformation. By a careful and skilled examination the defect could have been discovered by the plaintiff; but in fact it was not discovered by him until after the sale. The animal afterwards died, the death being the direct consequence of the malformation:—

Held, that the case came within the principles laid down by Blackburn and Hannen, JJ., in *Smith* v. *Hughes* (L. R. 6 Q. B. 597); that there was no binding contract for the sale of the animals in question, the parties never having been *ad idem*; and that the plaintiff was entitled to recover the price paid.

Held, also, *per* Lord O'Brien, L.C.J., and Gibson and Boyd, JJ., *diss.* Madden, J., that there was evidence of misrepresentation sufficient to sustain an action.

CASE STATED by the Lord Chief Baron on the hearing of a civil bill appeal.

The following are the material facts as set out in the case:—The case came before the Lord Chief Baron at the Spring Assizes, 1902, for the county of Longford, upon an appeal by the defendant from a decree given by the County Court Judge for £10 damages. The process claimed damages for breach of warranty,

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

K. B. Div. 1902. GILL v. M'DOWELL.

and (by amendment made by the County Court Judge) also for false and fraudulent misrepresentation. It was proved in evidence that the defendant had in his possession an animal of the ox tribe which when looked at from the back appeared to be a heifer, but which looked at from certain other directions appeared to be a bullock. The animal was, in fact, and as the defendant knew, a hermaphrodite. It had teats like those of a heifer, but its urinary organs had the outward appearance of those of a bullock. The defendant sent the animal to the April fair of Barry, in the county of Longford, for sale, together with two other animals, a bullock and a heifer. The three animals were purchased in the fair by the plaintiff, a cattle dealer, at the sum of £10 5*s.* each. A warranty was not asked for or given. Nothing whatever was actually said at the sale as to the sex of the animals, but the plaintiff bought under the belief that he was buying either a bullock and two heifers, or one heifer and two bullocks. The plaintiff to defendant's knowledge would not have purchased had he known of the malformation of the animal the subject of the cause of action. By a careful and skilled examination by the plaintiff the defect could have been discovered, but in point of fact it was not discovered by the plaintiff until the following day, when he sent a notice or message to the defendant to take the animal back, which the defendant refused to do. The animal, which was in bad health from the time of sale, died in the plaintiff's possession in the month of July following from uræmic poisoning occasioned by the retention of urine the result of swellings and abscess caused by the malformation; and the Lord Chief Baron found as a fact that the death was the direct consequence of such malformation.

The question for the Court was, whether the facts stated constituted evidence sufficient to support any cause of action by the plaintiff against the defendant in respect of the animal. If they did the process was, if necessary, to be deemed amended by stating such cause of action.

Gaussen, for the plaintiff:—

The conduct of the defendant in selling this animal, together with a bullock and a heifer, at a fair where bullocks and heifers are ordinarily sold, was calculated to mislead the plaintiff and

amounts to fraud: *Hill* v. *Gray* (1); *R.* v. *Barnard* (2); *Schneider* v. *Heath* (3); Kerr on Fraud, 3rd ed., p. 64. Even if this did not amount to fraud, the facts as found by the Lord Chief Baron bring the case within the principle laid down in *Smith* v. *Hughes* (4) by Blackburn and Hannen, JJ.

P. Law Smith, for the defendant:—

No deception of any kind was practised by the defendant. Unless there was a special fair for the sale of hermaphrodite cattle what could the defendant do but sell this animal at an ordinary fair? No warranty or representation is implied from the sale being at a fair: *Ward* v. *Hobbs* (5). There was no obligation on the defendant to point out the defect: Benjamin on Sales, 4th ed., p. 404. The mere passive acquiescence of the seller in the self-deception of the buyer will not entitle the latter to avoid the contract: *Smith* v. *Hughes* (6), *per* Cockburn, C.J. The maxim *caveat emptor* applies. The plaintiff was a cattle dealer, and therefore competent to make the "careful and skilled examination" mentioned by the Lord Chief Baron. The findings here as to the mental state of the parties are not sufficient to bring the case within the doctrine of *Smith* v. *Hughes* (4).

Cur. adv. vult.

Oct. 30.

LORD O'BRIEN, L.C.J.:—

This case, which has been stated for our determination by my Lord Chief Baron, is certainly a strange one. It has been said that so many cases have been decided in the course of the administration of the law that it is a cause of wonder that any remain for decision. However, such is the complexity and ever-changing nature of human transactions that new facts or new combinations of fact will continue to present themselves, and that new questions, arising on those facts or combinations of facts, will continue to exercise the minds of those engaged in the administration of the law. The facts of this case are few, but what inferences are to be drawn from them is by no means clear. It is all important to consider, not only the facts of the

(1) 1 Stark. 434.
(2) 7 C. & P. 784.
(3) 3 Campb. 506.
(4) L. R. 6 Q. B. 597.
(5) 4 A. C. 13.
(6) L. R. 6 Q. B. at p. 603

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case, but the findings of the Lord Chief Baron and the function imposed upon us by him. Facts and findings and function are clearly and succinctly set forth. I shall read the special case. [His Lordship read the case.]

Lord O'Brien, L.C.J.

Now, then, this is the special case, and what has the Lord Chief Baron found? That the animal in question was neither a heifer nor a bullock—that it was a hermaphrodite; that it was essentially different in some respects from a heifer and essentially different in some respects from a bullock; that it was an animal, though of the ox tribe, neither a heifer nor a bullock. But what else did my Lord Chief Baron find? This, a very important finding, that the plaintiff bought under the belief that the animals he was buying were a bullock and two heifers, and that the defendant was aware that the plaintiff was buying under the belief that he was buying either a bullock and two heifers or one heifer and two bullocks; he never for a moment believed that any one of the animals was a hermaphrodite, his belief being that the animal in question was either a bullock or a heifer, and the defendant's belief being that the plaintiff believed he (defendant) was contracting to sell things essentially different from a hermaphrodite, that is to say, a heifer or a bullock. The Chief Baron also found that the plaintiff to the defendant's knowledge would not have purchased had he known of the malformation of the animal which was the cause of action.

I will now consider whether the opinion expressed in *Smith* v. *Hughes* (1) applies to this case. In that case Smith sued Hughes for the price of oats. The oats were sold by sample. The jury found that the plaintiff believed that the defendant believed he was buying old oats, whereas the oats were in fact new oats. The verdict was set aside, and a new trial granted on the ground that the finding did not go far enough to warrant a verdict for the defendant; that to entitle the defendant to a verdict in the particular case the jury should have found also that the plaintiff believed that the defendant believed that the plaintiff was contracting to sell old oats. Now it may be argued that the Lord Chief Baron's finding falls short of such a finding; that he found that the defendant believed that the plaintiff believed he was

(1) L. R. 6 Q. B. 597

purchasing two heifers and a bullock, or two bullocks and a heifer, and that he did not find that the defendant believed that the plaintiff believed that he (the defendant) was contracting to sell two heifers and a bullock or two bullocks and a heifer. I really think this is what the Lord Chief Baron intended to find, and did, in fact, find; however, in my opinion there is evidence that the defendant believed the plaintiff believed that he (the defendant) was contracting to sell two heifers and a bullock, and if the plaintiff did so believe, the case comes, in my opinion, within the doctrine laid down in *Smith* v. *Hughes* (1), and the defendant is responsible.

I think also there is evidence of misrepresentation sufficient to sustain the action. It is perfectly notorious that a bad animal is often placed among good, so that the defects of the bad animal may, by association with the general lot, escape detection. In the case before us the animal of itself was calculated to give occasion to mistake; from one point of view it might be regarded as a heifer, and from another point of view it might be regarded as a bullock. It would, indeed, be hard to find anything more calculated of itself to deceive, and the defendant, well knowing that it was not a bullock or heifer, drove it into a fair where bullocks and heifers are sold, and deliberately put it into a category to which it did not belong, and to which he knew it did not belong. He associates it with a heifer and a bullock, makes it as one of a lot, and thereby the purchaser was, as a matter of fact, deceived, there being, I think, a tacit representation that this animal, standing in this cattle fair with a heifer and bullock, and offered for sale with them, was either a heifer or a bullock. The plaintiff was, as a matter of fact, deceived; the defendant knew he was deceived. In my opinion there is some evidence that he was thrown off his guard by the action of the defendant. I do not think if the case was before a jury that it could be withdrawn from them.

GIBSON, J.:—

A curious *lusus naturæ* is the subject of this argument. The plaintiff's case is based on one of two grounds: the contract of

(1) L. R. 6 Q. B. 597.]

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sale was procured by fraud; or there was no valid contract at all, because the parties were not *ad idem* as to the subject of sale. Three points are relied upon—first, that the animal was sold at an ordinary fair; second, that it was sold with two other beasts—a bullock and a heifer—a circumstance which might have thrown the plaintiff off his guard; and, thirdly, the defendant knew that the plaintiff was buying under the belief that the animal was contracted to be sold as a bullock or a heifer.

The animal was bovine, but from the peculiar nature of its malformation it would be impossible to say that it was male or female. It was not that the organs of generation were deficient or absent; an emasculated boar or a sow subject to spaying remains respectively male or female. This animal was a hermaphrodite of misleading appearance. Looked at from one direction it was a heifer; from another it was a bullock. It possessed no gender.

I now take up the points relied upon by the plaintiff.

First, I cannot say that the fair was appropriated to beasts with a sex. The defendant by selling in the fair cannot be fixed with a tacit affirmation that the animal was male or female. No doubt such animals are usually the subject of a sale, but no implied representation necessarily results from an ordinary fair being the place of sale: *Ward* v. *Hobbs* (1).

The second point—the sale of the hermaphrodite with two other natural animals at the same price per head—deserves more consideration. The case does not find that the plaintiff had any dishonest intention in so doing, or that the cattle were placed so as to screen the hermaphrodite, or that the sale was calculated to throw the plaintiff off his guard. On the other hand, the fact of the sale of the three animals at the same time, place, and price is expressly stated as a relevant fact; the beast was in its character misleading; defendant knew that plaintiff was buying under a mistake as to the subject of contract; and what is reserved for us is whether there was *any* evidence. It was the duty of the seller to do and say nothing which would disarm the buyer's vigilance. The peculiarity of this animal was so unusual that no ordinary dealer would be on his guard against it as a possible risk. I think the

(1) 4 A. C. 13.

sale of the two beasts, a heifer and bullock, at the same time, place, and price, was calculated to encourage and facilitate the purchaser's oversight, and that the defendant ought to have known this.

There is another point on which an inference of deceit may be possibly based. The animal was misleading—a sort of living lie. Viewed from behind its teats attested its female sex. The plaintiff accepted this silent but false affirmation. The beast told its own lie: it was a machine of fraud which the defendant utilized. Is the case in principle different from that of a book with a forged title-page, or plate with a forged hall-mark which the vendor knows the purchaser buys and pays for in the belief that the vendor is selling it as genuine? If the buyer was in fact deceived, would the result be affected by the circumstance that the forgery was inartistic and that careful examination would have revealed the truth? On the whole, I think there was some evidence of contrivance and deceit.

The last point is whether, on the facts found, the case comes within the principle laid down by Blackburn and Hannen, JJ., in *Smith* v. *Hughes* (1), which is treated as clear law in the last editions of Leake, Pollock, Anson, and Benjamin. Apart from warranty or condition, a chattel must correspond with the description under which it is sold (Benjamin on Sales, p. 571). Where the seller knows that the buyer is under a mistake as to the subject-matter contracted to be sold there is no enforceable contract. The plaintiff bought what he thought the defendant was professing to sell as a heifer. If the plaintiff had expressed his meaning in words, and defendant said nothing, or if the defendant had expressly sold the beast as a heifer, unquestionably there would have been no valid sale. Where nothing is said on either side, if the vendor knows that the purchaser intends a different contract from what he himself contemplates, he cannot by silence impose on the purchaser a contract which he knows the latter never intended to make. Does the principle apply here? Nothing was said as to warranty or description; the animal was there to be examined, and its defect on careful examination would have been

(1) L. R. 6 Q. B. 608, 610, 611.

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ascertained. Does this exclude the application of the principle? I think not. The rule depends on the necessity of intelligent consent to the same contract; and it does not cease to be applicable because the buyer is guilty of some oversight or want of care. The vendor cannot force on the purchaser an article which he knows the latter never proposed to buy.

The principle does not conflict with the maxim *caveat emptor*, or with the legal right of the vendor to acquiesce in the silent self-deception of the purchaser, where he is under no duty to set him right. It only applies where the parties are not *ad idem* as to the contract proper. The distinction is clearly pointed out in the judgments in *Smith* v. *Hughes* (1) and in the text-books to which I have referred.

Whether the equitable doctrine of mistake might not be invoked I have not thought it necessary to discuss. It would appear eminently unconscientious to bind the plaintiff by a bargain which the defendant knew the plaintiff never intended to make, and that the seller should retain a price which the buyer never intended to give

The determining fact in the case is that the animal did not answer the description of bullock or heifer under which description, as part of the contract, the defendant knew that plaintiff was proposing to buy. It was not a case of the animal being a bullock or a heifer with a sexual malformation or deficiency.

I hold that there was no effectual contract; that there was evidence of deceit; and that the plaintiff was at liberty to repudiate the sale.

MADDEN, J.:—

The difficulty which I have felt throughout this case has been caused not so much by legal considerations as by the finding of the Lord Chief Baron on a matter of fact as to the mental condition of the contracting parties. It was argued by Mr. Smith that the subject-matter of the contract was three head of cattle, animals of the bovine species, without regard to sex. One of these animals had a malformation which had a relation to sex, and which rendered the animal especially liable to the disease of

(1) L. R. 6 Q. B. 597.

which it afterwards died. The existence of this malformation was known to the seller. It was unknown to the buyer, but, it could have been discovered by a careful and skilled examination, that is to say, such an examination as a cattle dealer would be competent to make. If there were no more than this to be considered, I should be clearly of opinion that the plaintiff had no case. As a general principle a vendor, although bound to employ no artifice for the purpose of concealing a defect of which he is aware, is under no legal obligation to disclose the existence of a defect, even though the non-disclosure is likely to deceive the buyer. In *Ward* v. *Hobbs* (1) it was held by the House of Lords that even when a statute prohibited sending diseased pigs to a market, the conduct of the vendor in exposing pigs for sale in the market did not amount to a representation as between him and the purchaser that they were free from disease.

I asked Mr. Gaussen what the seller ought to have done. I fully accept his statement as to what he himself would have done if he had found himself in the possession of a hermaphrodite in a public fair. But this is a counsel of perfection scarcely applicable to ordinary cattle dealers, who could not be expected to call attention to the peculiarity existing in the present case. Another suggestion is that the animal should have been sold separately, and that the driving of this animal into a fair, and selling it in company with a bullock and a heifer, amounted to fraud. But there is not a special stand provided for hermaphrodites at a fair, and if the seller had treated the animal as one that could not be sold with bullocks or heifers this would practically amount to a representation or admission that the animal suffered from something that rendered it not ordinarily saleable. I do not think that the seller was bound to do this. In my opinion the maxim *caveat emptor* would apply if there were nothing more in the case.

But we have to deal, not with the contract as it presents itself to our minds upon the evidence, but with certain findings as to matters of fact, including the mental condition of buyer and

(1) 4 A. C. 13.

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seller. On a careful examination I cannot avoid coming to the conclusion that the mental condition of the buyer and seller as found by the Lord Chief Baron is not distinguishable from the mental condition which, according to the principles laid down in *Smith* v. *Hughes* (1), would lead to the conclusion that there was no effective contract, the parties not being *ad idem*. On the authority of this case, as applied to the finding to which I have referred, and on that ground alone, I concur in the decision of the Court.

BOYD, J. :—

In my opinion, on the facts found by the Lord Chief Baron, there is evidence sufficient to support a cause of action by the plaintiff against the defendant.

The defendant, a farmer, was possessed of, at least, three animals of the "ox tribe"; one a bullock, another a heifer, and a third neither a bullock nor a heifer, but an hermaphrodite, or, as I may call it, a "freak." He brought these three animals together to the fair of Barry, in the county of Longford, for the purpose of sale, he well knowing their nature and character. The plaintiff, a cattle dealer, saw the animals in the fair, and he bought the three under the belief that he was buying a bullock and two heifers, as found by the Chief Baron, and the defendant was aware, as also found by the learned Judge, "that the plaintiff was buying under the belief that he was buying either a bullock and two heifers or one heifer and two bullocks." The Chief Baron also finds that "the plaintiff to the defendant's knowledge would not have purchased had he known of the malformation of the animal, the subject of the cause of action."

Nothing was *actually* said at the sale as to the sex of the animals. I am quoting the words of the Chief Baron, and from them I infer that he was of opinion that though no *actual* statement was made, it was impliedly represented by the defendant that the animals were of the sexes, character, and nature of those usually bought and sold, and that they were merchantable.

It is argued on behalf of the defendant that the doctrine of

(1) L. R. 6 Q. B. 597.

caveat emptor applies to this case, and that as the plaintiff had the opportunity of examining the animals he is bound by his bargain for the purchase of the freak as well as of the others. The Chief Baron has found that "by a careful and *skilled* examination" the defect could have been discovered. Is this, however, the nature of the examination which the plaintiff was bound to make? I take it that he was only bound to make a careful and reasonable examination, and not to apply skill, which he might not, and should not be assumed to, possess, to discover a defect such as existed in the animal in question. This animal was not of the nature or character of those usually the subject of sale and purchase, though to the eye of the purchaser it was such, and the defendant well knew that it was not, and I think he knowingly practised a deception on the plaintiff.

This is not the case of a man who got the article or goods which he bought, but which proved to be of a quality different to that which he believed he had bought. In this case the defect was not in the quality but in the character and nature of the article. He never wanted or intended to buy a freak, and the defendant well knew that he did not, but by mixing it with the animals which he knew the plaintiff wanted he passed it off on the plaintiff, he well knowing all the facts.

In the case of *Smith* v. *Hughes* (1) the defendant got the article he bought, but not of the condition as to age that he believed he bought. In giving his judgment in the case, Cockburn, C.J., on page 603 of the report, says: "The plaintiff was conscious of the existence of such belief, but did nothing *directly or indirectly* to bring it about," and then states the law to be—"The question is whether under such circumstances the *passive* acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion it will not"; and further down in his judgment he says: "If he gets the article he contracted to buy, *and that article corresponds with what it was sold as*, he gets all he is entitled to, and is bound by the contract"; and again on page 606: "So long as the thing sold answers to the *description* under which it is sold," the

(1) L. R. 6 Q. B. 597.

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seller is not bound to disabuse the buyer as to any exaggerated estimate of its value. Hannen, J., in his judgment in the same case at p. 611, states the law to be: "In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he (the plaintiff) was contracting to sell old oats."

In the present case the findings of the Chief Baron, in my opinion, bring the case within the law as so stated by Cockburn, C.J., and Hannen, J., and entitle the plaintiff to a finding in his favour on the question submitted for our decision.

Solicitor for the plaintiff: *J. J. Ham.*
Solicitor for the defendant: *T. W. Delany.*

J. G. T.

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THE KING *v.* HERRON AND MONTGOMERY (1).

Nov. 20, 22, 24.

Principal and surety—Liability of surety—Alteration of the duties and office of the principal debtor—Scire facias—*Relator—Costs.*

B. was in 1896 duly appointed to "the office of clerk and storekeeper" in the Armagh District Lunatic Asylum, at a salary of £80 per annum, with allowances valued at £50 (rations, fire and light, and apartments in the Asylum, &c.). On the passing of the Local Government (Ireland) Act, 1898, the Committee of Management separated the office of clerk and storekeeper, and appointed another person to be storekeeper. B. was continued as clerk, at a salary of £100, without apartments or other allowances, and was compensated (under sect. 115) for the loss of his emoluments as storekeeper. He was dismissed in 1900, and accounts showed that he was in default in respect of a sum of £52 14*s.* 6*d.* received by him during that year.

The defendants, in 1897, had executed, as B.'s sureties, a bond to the Crown, conditional on the due discharge by B. of his duties in "the office of clerk and storekeeper." They had no notice of the changes made in 1899-1900. Proceedings having been instituted (in the name of His Majesty) by writ of *scire facias* against the defendants, as sureties for B.:—

Held (on new trial motion), that, even assuming that the old office had not

(1) Before GIBSON, MADDEN, and BOYD, JJ.

been, in fact, abolished, still it had been subjected to such material alterations that the bond could not be held to apply to it, and that the defendants were entitled to judgment.

Held, further, following *Holme* v. *Brunskill* (3 Q. B. D. 495), that, even assuming the bond to apply to the office in its altered form, the defendants should have been given an opportunity of considering whether they would adhere to the bond or not.

No relator was joined in the writ or pleadings. *Quære*, could the defendants, by applying to the Attorney-General at the inception of the proceedings to have a relator joined as a party, or otherwise, have secured to themselves a right to costs in the event of judgment being given against the Crown?

MOTION FOR JUDGMENT.

This action was tried before Mr. Justice Kenny and a common jury of the city of Dublin in June, 1902. It was brought by *scire facias* on a bond of the defendants conditioned for the proper discharge by William Bunting of his duties in the office of clerk and storekeeper of the Armagh Lunatic Asylum. The writ was issued by the solicitors for the Committee of Management of the Lunatic Asylum, Messrs. Peel & Son; was entitled at the "Revenue Side" of the Court; and in the name of our Sovereign Lord the King as plaintiff, no one being joined as relator. The writ bore the fiat of the Attorney-General, allowing these proceedings to be taken. Notice of appearance "to the action of the Attorney-General" was served, and a plea filed which in substance alleged by way of defence that the bond was conditional for the proper discharge by Bunting of his duties in the "office of clerk and storekeeper"; and (*a*) that this office was determined in 1899, and that the obligation under the bond then came to an end; and (*b*) that in 1899 the governors of the Asylum effected such a change in the duties, remuneration, and office of Bunting that the defendants were thereby so prejudiced as to be relieved of responsibility. A reply was delivered in the name of the Attorney-General, on which issue was joined.

The default of Bunting, which was admitted to amount to £52, occurred in 1900. He had been appointed to the "office of clerk and storekeeper" in 1896 at a salary of £80 and allowances valued at £50, viz. rations, £25; apartments, £15; fuel and light, £5; and washing, £5. By their bond, dated 25th June, 1897, Bunting and the defendants as his sureties became jointly

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and severally bound to the Crown in the sum of £200. The bond recited that the governors of the Asylum had elected Bunting "into the office of clerk and storekeeper" of the Asylum, and that upon his election "to the said situation or appointment" he had agreed to enter into this bond with sureties "for the faithful and proper discharge of the duties of the said situation of clerk and storekeeper," and declared the condition of the bond to be that if he should "from time to time and at all times well and satisfactorily as such clerk and storekeeper keep all stores," &c., "committed to his charge, and keep faithful and correct inventories of the same" . . . "and well and truly account for and deliver to" the governors or other proper persons thereto entitled "all stores and other goods and chattels whatsover," at any time or times entrusted to his care in discharge of his said situation or appointment or otherwise in connexion with the said District Asylum," and should not "embezzle or make away with any of the said stores and other goods and chattels and effects which "should or be committed to his care in discharge of his said situation or otherwise in connexion with the said District Asylum" . . and should when required deliver a "just and true account of all such goods, stores, and chattels whatsoever which in his said situation or appointment" should come into his hands, or which he should be entrusted with for the Asylum, and also should "make good and answer for or pay the moneys due on balance of such accounts to" the governors or their successors, and should from time to time keep all the accounts, books, and writings belonging to or relating to the said situation in a proper and businesslike manner; and if the two sureties (the now defendants) should save harmless the Crown and the governors of the Asylum and their successors in respect of "any act, deed, matter, or thing whatsoever done or omitted to be done by the said William Bunting in or during the continuance of his said situation or appointment," then the obligation to be void, but otherwise to be and remain in full force and virtue.

Bunting having been appointed in 1896, and his appointment having been duly confirmed by the Lord Lieutenant, he continued to act until the passing of the Local Government Act, 1898. After the passing of the Act, the Asylum Committee, in compliance, as

appeared, with some communication from the Local Government Board, separated the "offices" of clerk and storekeeper; and on the 19th December, 1898, resolved "that the offices of clerk and storekeeper be separated." On the 9th January, 1899, they passed a resolution: "That the clerk's salary be £100 per annum, without allowances, and that a storekeeper be appointed at a salary of £40 per annum, with rations and allowances valued at £30 per annum, and that the Inspector of Lunatics be requested to obtain the necessary Order in Council sanctioning same."

In reply to this Bunting wrote requesting the Asylum Committee to reconsider their decision as to granting £100 without allowances on the division of the offices of clerk and storekeeper. The committee, however, adhered to what they had done, and on the 10th July, 1899, James Ruddell was appointed "storekeeper" at the remuneration and allowances previously fixed. About the same time Bunting, who was continued in the office of "clerk" at the new salary, sent in a claim for compensation under section 115 for loss of salary. In this claim Bunting stated that the Asylum Committee appointed by the County Council had separated the office of clerk and storekeeper, and that the claimant was continued in the office of clerk at a salary of £100 per annum without allowances, and was deprived of the office of storekeeper. His claim, based on the average of five years' emoluments received by his predecessor and himself, purported to show an annual loss of £55 11*s.* 2*d.* The County Council obtained the advice of counsel, which (as the Court now held) proceeded on the mistaken assumption that Bunting had no fixity of tenure in his office. There was some correspondence with the Local Government Board, but ultimately it was settled, apparently on the basis of counsel's opinion, that Bunting should receive, by way of compensation, £21 13*s.* 4*d.* per annum "as long as he is in the service of the Asylum." This would be the exact sum which he would have received (but for life) if he had been compensated for the abolition of his entire office of clerk and storekeeper.

Bunting was suspended or discharged in November, 1900, on account of irregularities of conduct. Before July, 1899, Bunting was resident at the asylum, was under the control of the head official, and had to keep regular hours, etc. From January, 1899,

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when he ceased to have a right to reside in the Asylum, he was under control only during office hours, from about 10 to 5 o'clock. The default was in respect of a sum (£52 14*s.* 6*d.*) received for the sale of some pigs the property of the Asylum. This sum had been received by Bunting in July, 1900, and had admittedly not been accounted for. While clerk and storekeeper about £12,000 of stores used to pass through his hands each year.

At the conclusion of the evidence, *Matheson, K.C.*, for the plaintiff, asked for a direction on the ground that there was a default within the words of the bond, that the latter guaranteed fidelity in the office of clerk as that office stood after Bunting ceased to be storekeeper; that the resolution of the committee did not determine the office of clerk held by Bunting; and that the alteration did not in any way prejudice the sureties, but, on the contrary, was in ease of them.

Hume, K.C., for the defendants, asked for a direction on the grounds:—(*a*) that the bond was limited to one single office of clerk and storekeeper, and that that office determined in January, 1899, before Bunting's default; (*b*) that the transactions of 1899 amounted to a material change in the employment sufficient to discharge the sureties; (*c*) that the alteration in the terms of appointment in 1899 prejudiced or might prejudice the sureties or increase their risk.

The learned Judge directed the jury to find for the defendants, but abstained from giving judgment. It was also found that the defalcation was £52 14*s.* 6*d.*, for which sum judgment was to be entered for the Crown if the verdict was to be changed, and it was agreed that the Court should draw all proper inferences of fact.

Counsel for the plaintiff now moved to set aside this verdict, and to have judgment entered for the plaintiff for £52 14*s.* 6*d.* and costs, on the ground that the Judge should so have directed the jury.

Matheson, K.C., Bates, K.C., and *Davison*, for the plaintiff.

John Gordon, K.C., Hume, K.C., and *Megaw*, for the defendants.

[The following authorities were referred to upon the question whether the defendants' obligation under the bond had been determined by what occurred in 1899 :—*Skillett* v. *Fletcher* (1) ; *Holland* v. *Lea* (2) ; *Holme* v. *Brunskill* (3) ; *North-Western Railway* v. *Whinray* (4) ; *Bonar* v. *Macdonald* (5) ; *Oswald* v. *Mayor of Berwick* (6) ; *Harrison* v. *Seymour* (7) ; *Sanderson* v. *Aston* (8) ; *Tayleur* v. *Wildin* (9) ; *Frank* v. *Edwards* (10).]

GIBSON, J. :—

Nov. 24.

This was a proceeding by the Crown brought against the defendants as sureties upon a bond, dated June 24th, 1897, for the due performance by William Bunting of his duties as clerk and storekeeper of the Lunatic Asylum at Armagh, to which office it is recited that the said Bunting had been elected. The said appointment was made under 30 & 31 Vict. c. 118. Sect. 2 enabled the Lord Lieutenant by Order in Council to determine the staff of any District Asylum, to appoint salaries, and define duties. Under sect. 6 officers were removable with the approbation of the Lord Lieutenant. Sect. 8 contained provisions as to superannuation. Bunting was appointed under this statute to the office of clerk and storekeeper (which his predecessor had held at a higher rate of remuneration) at the salary of £80 per annum, with allowances valued as follows :—£25 rations, apartments £15, fuel and light £5, and washing £5, making altogether £50. This was confirmed by the Lord Lieutenant, and at the date of the passing of the Local Government Act, 1898, Bunting held the combined office of clerk and storekeeper at £80 per annum, with said allowances as so approved, and he could not be dismissed from his office without the approval of the Lord Lieutenant.

The Asylum Committee appear to have misconceived the nature of his tenure of office, and on 18th December, 1898, it was proposed that the offices of clerk and storekeeper should be separated. On January 9th, 1899, it was resolved that the clerk's salary

(1) L. R. 1 C. P. 217 ; L. R. 2 C. P. [469.
(2) 9 Exch. 430.
(3) 3 Q. B. D. 495.
(4) 10 Exch. 77.
(5) 3 H. L. Cas. 226.
(6) 5 H. L. Cas. 856.
(7) L. R. 1 C. P. 518.
(8) L. R. 8 Ex. 73.
(9) L. R. 3 Ex. 303.
(10) 8 Exch. 214.

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should be £100 without allowances, and that a storekeeper be appointed at a salary of £40, with allowances valued at £30, and that the Inspectors of Lunatics be requested to obtain the necessary Order in Council sanctioning the same. In reply to this Bunting wrote a letter requesting the Governors to reconsider their decision in granting £100 per annum without allowances on the division of the offices of clerk and storekeeper. On the 10th July Ruddell was appointed storekeeper at the rate of remuneration previously fixed.

In July, 1899, Bunting sent in his claim for compensation for loss of salary under the Local Government (Ireland) Act. In this claim (paragraph 3) he states that the Asylum Committee appointed by the County Council separated the offices of clerk and storekeeper, and that the claimant was continued in the office of clerk at a salary of £100 per annum without allowances, and was deprived of the office of storekeeper. His claim, based on the average of five years' salary received by his predecessor and himself, purports to show an annual loss of £55 11*s.* 2*d.* The County Council obtained counsel's opinion, which proceeded on the mistaken assumption that Bunting had no fixity of tenure. There was some correspondence with the Local Government Board, but ultimately, apparently on the basis of counsel's opinion, it was settled that Bunting should receive £21 13*s.* 4*d.* per annum so long as he remained in the services of the Asylum. This would be the exact sum he would have received if he was compensated for the abolition of his entire office of clerk and storekeeper, though the duration of the pension was curtailed. Afterwards Bunting misappropriated £52 14*s.* 6*d.*, the price of certain pigs received by him as clerk. The present proceedings were accordingly thereupon taken. Defendants dispute liability on two grounds:—(1) The bond does not apply to the office in its altered state; (2) the changes in the office were such that the sureties might have been prejudiced, and were entitled to be consulted. I shall shortly deal with these points:—

1. How would the matter stand apart from the Local Government Act? If the office was altered in any term, the continuance of which could be considered as a condition to the surety's liability, the defendants would be discharged. Every such alteration is

material, as it is part of the contract: *Holme* v. *Brunskill* (1); *North-Western Railway* v. *Whinray* (2). A surety cannot (as Lord Watson says in *Tyler* v. *Bank of New South Wales* (3)) be made liable for default in the performance of a contract which he had not guaranteed: *Polak* v. *Everett* (4). On the other hand, where the office is described generally, a change involving even a reduction of salary is not necessarily incompatible with the liability of the sureties continuing: *Frank* v. *Edwards* (5).

In the present case the amount of salary was not specified in the bond, but the office, the subject of guarantee, was a statutory one to which a specific official salary was attached, and from which the holder could not be removed without the approbation of the Lord Lieutenant. Without such approbation, and by the voluntary action of the parties, the office has been altered; it has been cut into two, and the salary changed. In my opinion the case falls within the reasoning of Alderson, B., and Pollock, C.B., in *Holland* v. *Lea* (6). Taking the case as it would stand at common law, there has been an organic change in the office as it existed at the time of the bond. Apart therefore from any question of actual prejudice or disadvantage, the defendants are discharged.

2. What is the operation of the Act of 1898? As a transferred officer under the Act of 1898, sect. 115, sub-sect. 18, Bunting was entitled to retain his office by the same tenure and at the same remuneration as before. This was apparently overlooked, and we must take it that Bunting assented to his office being split, and the part relating to storekeeping being confided to a new officer. Two questions arise:—(1) Was his old office completely abolished, and did he receive a new appointment as clerk? (2) If only part of the old office was cut away, and Bunting was continued as clerk at a new salary by virtue of his original appointment, would defendants remain liable?

It certainly looks as if, acting under a common misapprehension that he was removable at will, Bunting accepted compensation on the footing of his old office having been entirely abolished. If

(1) 3 Q. B. D. at p. 508.
(2) 10 Exch. 77.
(3) 11 A. C. at p. 603.
(4) 1 Q. B. D. 669.
(5) 8 Exch. 214.
(6) 9 Exch. at pp. 441–443.

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so, his clerkship at £100 per annum was a new office, and, as such, not within the bond. Even if this was not so, the office was subjected to such radical alteration that the bond cannot fairly be held to apply to it.

3. Assuming that the office preserved its identity, and that the bond applies to it in its altered form, were the changes such as possibly to prejudice the defendants? The office, which, while residential was subject to discipline and constant supervision, became an extern office, the allowances were abolished, the salary altered, the wage-earner became in part a mere pensioner, one office was turned into two, and the rights of tenure and superannuation attached to the office contemplated by the bond were surrendered and modified. These alterations were so revolutionary that the sureties might have reasonably considered that they were prejudiced. They ought to have been given an opportunity of considering whether they would adhere to the bond or retire: *Holme* v. *Brunskill* (1).

Judgment, therefore, must be entered for the defendants in accordance with the verdict directed at the trial.

MADDEN, J., concurred.

BOYD, J.:—

I concur in the judgment of my brothers Gibson and Madden, but with considerable doubt. In my opinion a very considerable diminution of the responsibilities of the sureties of Mr. Bunting resulted from the change that was made in the position of Mr. Bunting by his appointment to the office of clerk instead of that of clerk and storekeeper. I think, however, from all the circumstances of the case, that his original appointment, in respect of which the defendants were responsible, was absolutely determined, and that his appointment to the office of clerk was a new and different one to that for the faithful discharge of which they had made themselves responsible.

The calculation on which compensation was awarded was based upon what he was entitled to on the *abolition* of his office, and on this basis he was awarded compensation estimated at £21 13*s.* 4*d.*

(1) 3 Q. B. D. 495.

True, he would have been entitled to this amount for the term of his life; but instead of this he consented and agreed that in consideration of his being retained in the office of clerk he should abandon his right to a life annuity, and that he should only be entitled to it during his continuance in the office of clerk.

Even should it be considered that he was continued in the old office with diminished duties, by his acts I think he surrendered the right, which existed under his former appointment, that he could not be dismissed from his office except with the approval of the Lord Lieutenant, and put it in the power of his employers to dismiss him at their pleasure. This, in my opinion, made a very serious difference to his sureties, who were not consulted in the matter as they should have been. On these grounds, I concur in the judgment of the other members of the Court.

Hume, K.C., applied for costs.

Matheson, K.C., objected that no costs could be given against the Crown, and referred to *Madden's Estate* (1); 18 & 19 Vict. c. 90.

GIBSON, J., pointed out that the present case was in substance a claim by the County Council. Any moneys recovered would have been held by the Crown in trust for the County Council. There seems great hardship if defendants cannot recover costs by having the Council as relators, or by the Crown imposing conditions before allowing the bond to be put in suit, or in some other way. No statute or precedent, however, for giving costs to defendants in such a proceeding has been cited (2).

Leave was given to the defendants, if so advised, to apply to the Court for the costs of the suit, but meanwhile the order was directed to be made up without any mention of costs.

No subsequent application for costs were made (3).

Solicitors for County Council: *J. E. Peel & Son.*

Solicitor for defendants: *R. Henderson.*

(1) [1902] 1 I. R. 63.

(2) See *The Queen* v. *Hobart* (11 Ir. Eq. R. 397); *The Queen* v. *Guinness* (3 Ir. Ch. R. 211).

(3) The report of this case was prepared by the late Mr. A. E. R. Joynt.

Appeal.
1902.
Nov. 11.

KENNEDY *v.* BUCHANAN (1).
LOUGHREY *v.* BUCHANAN.

Parliament—Franchise—Non-payment of rates—Tender.

A voter, whose name appeared on the Parliamentary Register, offered payment in the month of May, 1902, to the rate-collector of all poor rates due in respect of the qualifying premises up to January 1, 1902. The rate-collector refused to accept payment of the rates so offered unless the half-year's rates that had since become payable were paid with them. The voter subsequently, in June, 1902, caused a tender of the rates due up to January 1 to be made to the collector, who again refused to accept the same. The rates were not paid on July 1, 1902:—

Held, that payment of the poor rates was an essential condition for obtaining the franchise; that tender was not equivalent to payment so as to support the qualification; and that the name of the voter should be removed from the register.

Another voter, whose name was on the Parliamentary Register, called on the rate-collector on March 1, 1902, and offered to pay the rates then due. It being inconvenient to the collector, though in his office hours, to take the rates on this occasion, he requested the voter to defer payment and call again. The Revising Barrister found, as a fact, that but for the neglect of the collector all the rates due in respect of the qualifying premises up to January 1, 1902, would have been then paid by the voter. Subsequently, after March 31, 1902, the voter again called on the collector, and offered to pay the same rates, but the collector refused to accept payment of the rates so offered unless the half-year's rates that had since become payable were paid with them. The rates were not paid on July 1, 1902:—

Held, that payment of the poor rates was an essential condition for obtaining the franchise; that the conduct of the rate-collector afforded no excuse for their not being paid; and that the name of the voter should be removed from the register.

APPEALS from two decisions of Mr. Megaw, Assistant Revising Barrister in East Donegal, removing the names of James Kennedy, Con Devenny, and Michael Loughrey from the Parliamentary Register.

(1) Before LORD O'BRIEN, L. C. J., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

The facts were thus set forth in the case stated in the case of James Kennedy :—

The appellant was served in the usual course with a demand note for the rates payable previous to January 1, 1902.

In the beginning of May, 1902, the half-year's poor rates payable previous to January 1, 1902, had not been paid by the appellant. In that month he saw the rate-collector, and offered payment of all the poor rates due in respect of the qualifying premises up to January 1, 1902, but the rate-collector informed him that further poor rates had become payable in the meantime, and that he could not accept payment of the rates offered without the half-year's rates since payable. At that time no demand note for any poor rates except those offered to the collector had been served on the appellant. It was also ascertained and admitted that the notice requiring payment of arrears of rates in Form No. 33 of the Registration (Ireland) Rules was never sent.

Again, on June 30, the appellant sent his son to the poor rate collector with the poor rates payable by him up to January 1, 1902, and Con Devenny, of Lettershambo, whose name also appeared in the same register, sent his poor rates payable up to the same date through the same agency. The appellant's son duly tendered these rates to the collector. The collector refused to accept payment unless the rates that had since accrued due were also paid, and thereupon delivered to the appellant's son a demand note for the poor rates dated 23rd May, 1902.

Neither Kennedy nor Devenny actually paid the rates till after July 1, but since that time the rates have been paid. I made inquiries as to the reasons which influenced the rate-collector to refuse the proposed payments, and I ascertained that he followed the practice prescribed by the County Council. It was proved that immediately after the end of the financial year (March 31) the rate-collectors are obliged to return all receipt-books and documents in their possession connected with the collection of the rates to the County Council offices. New books are then issued to the collectors, and the collectors are no longer empowered to accept payment of rates due prior to the end of the last financial year separately, but these are added as arrears to the next poor rates payable, and form with them the subject of the next demand note

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served on the ratepayer. I annex form of receipt in use. It substantially complies with Form 2 in the schedule to the Local Government Board General Order of April 17, 1899.

For some reason I do not quite appreciate notices in Form No. 33 of the Registration (Ireland) Rules, 1899, are not served by the County Council officials on ratepayers in arrear.

The rate-collector acted quite *bona fide* in the matter.

On these facts I decided that the appellant had not paid all poor rates in respect of the qualifying premises that had become payable in respect thereof previously to the 1st January, 1902, and I expunged his name from the list of voters. If I were wrong in so deciding, the appellant's name should be restored to the list.

The name of Con Devenny and another voter were appended to the case to abide its result.

The facts of Michael Loughrey's case were set out in a separate case stated, and were as follows :—

Michael Loughrey on March 1, 1902, went to pay his rates to the rate-collector's office in Stranorlar, and found the rate-collector in his office. The only rates then due were the poor rates for the year ending March 31, 1902. The appellant informed the rate-collector that he had come to pay his rates. It was a fair day in Stranorlar, and somewhat late in the evening, though not later than the rate-collector often received payment of rates, and I found as a fact that it was within office hours. The rate-collector had his books tied up for the evening, and as rate-collecting with him was somewhat of a cumbrous process, he requested the appellant to defer payment and to call at his (the rate-collector's) house. The rate-collector said that he meant the appellant should call that evening : the appellant seems to have understood that he was to call on some subsequent day. At all events, the poor rates were not paid on that occasion ; the money was not produced, but the appellant had it in his pocket, and I found as a fact that the poor rates payable in respect of the qualifying premises up to the 1st January, 1902, were not paid on that day simply through the neglect of the rate-collector. Shortly afterwards—about a fortnight, the appellant stated, but,

as I believed and found to be a fact, shortly after the end of the financial year—the appellant again called on the rate-collector at his own house with the same poor rates, but he was then informed by the collector that payment could not be received, as his books were sent to the County Council office, and that he (the rate-collector) could not receive payment until the books for the next financial year were delivered to him, and that then he could not receive payment of the rates due prior to January 1, apart from the rates payable subsequent to March 31. For the explanation of his procedure I stated the facts so far as I could ascertain them in James Kennedy's case, and refer thereto.

On these facts I found that Michael Loughrey had not paid all taxes in respect of the qualifying premises that had become payable in respect thereof previously to January 1, 1902, and expunged his name from the register.

If I was wrong in so deciding, the name of Michael Loughrey should be restored to the list.

Clancy, for the appellants:—

The rates due to January 1 were tendered by the appellants and refused by the rate-collector. Tender is equivalent to payment: *Holmes* v. *Flaherty* (1). To decide otherwise would enable an official to deprive a voter of the franchise.

The respondent (the objector W. Buchanan) did not appear.

LORD O'BRIEN, L. C. J.:—

We are all of opinion that actual payment of the rates is a condition precedent to obtaining the franchise. One of the essential elements of the statutory qualification, created by the 3rd section of the Act of 1867, is that the claimant "*has* paid" on or before the first day of July all the poor rates payable in respect of the premises. If the claimant tender payment of the rates and the collector refuse to accept them when so tendered, the collector may possibly be sued in a civil action by the claimant for damages, and if the collector refuse to accept payment of the rates from a corrupt motive, he can be indicted.

(1) 18 L. R. Ir. 310.

Appeal. 1902. KENNEDY v. BUCHANAN. LOUGHREY v. SAME. Lord O'Brien, L.C.J.

In *M'Daid* v. *Galbraith* (1) I stated that, notwithstanding the very emphatic expression of opinion by the Lord Chief Baron in *Holland* v. *Chambers* (*John Doherty's Case*) (2) to the contrary, I adhered to the view which I had expressed in *Murray* v. *Leonard* (3), that tender of the amount of the rates is not enough, but that payment of the rates was an essential condition of the franchise, and I adverted to the fact that Lord Justice Barry intimated that he agreed with my view that there must be, as we now unanimously hold, an actual payment of the rates to enable the claimant to obtain the franchise. If we did not so hold, we should ignore the language of the Act of Parliament, which says:—"Every man shall be entitled to be registered as a voter who is qualified as follows:—(that is to say) has on or before the first day of July *bona fide* paid . . . all poor rates that have become payable by him in respect of the said premises up to the preceding first day of January"—plainly making the payment of the rates a condition precedent to being admitted to the franchise.

Mr. Clancy has relied upon the case of *Holmes* v. *Flaherty* (4), where it was held that tender of the sum due for rent was equivalent to payment of that sum within the terms of section 71 of the Land Act of 1860. I think that was rather a benevolent decision: it is plain that Sir Michael Morris, C.J., dissented from the majority of the Court; and in *Hogg* v. *Smyth* (5) Lord Chancellor Walker pointed out that before it can be held that tender of rent not accepted by the landlord is equivalent to payment, it will be necessary to consider carefully, as contrasted with *Holmes* v. *Flaherty* (4), the decree of the Exchequer Chamber in *Kenmare* v. *Supple* (6), where the exact contrary was decided. In *Hogg* v. *Smyth* (5) Lord Justice Barry also pointed out that it must not be too hastily assumed that *Holmes* v. *Flaherty* (4) was good law, adding: "there is a great difference between payment and tender: payment extinguishes the debt: tender does not." With these criticisms on *Holmes* v. *Flaherty* (4) I altogether agree. I also venture to adopt the distinction drawn by Lord Justice Barry between payment and tender.

(1) [1901] 2 I. R. 490.
(2) 2 Lawson, 15.
(3) 1 Lawson, 157.
(4) 18 L. R. Ir. 310.
(5) 32 L. R. Ir. 191.
(6) Vern. & Scriven, 1.

As the statute expressly requires payment of the rates as a condition precedent, and as the rates were not paid by the claimant, his claim for a vote must be disallowed, and the decision of the Revising Barrister affirmed.

FITZGIBBON, L. J. :—

I was a member of the Court that decided *Hogg* v. *Smyth* (1), and I concurred in the view that *Holmes* v. *Flaherty* (2) was not to be assumed to be law, so far as it held that tender was equivalent to payment for the purpose of obtaining a writ of restitution. In the case of the franchise, I cannot get over the words of the Act, which virtually says that a man is not to get his vote unless he *has paid* his rates.

Two points have been put forward on behalf of the appellants which require consideration. First, it is said that holding tender insufficient opens a door to disfranchising voters through corruption or misconduct of officials. No such case has arisen. It is not to be assumed that it will arise, and it will be time enough to decide it when it does. It cannot arise in the case of any man who is reasonably punctual in payment of his rates, or vigilant as to his rights; and the consequences to the rate-collector of corruption or misconduct should be considered in estimating the chance of his so offending. Here the collector was hasty in bundling up his papers in March; but that was a long time before the date when non-payment ripened into disfranchisement. Opportunity after opportunity must have arisen for payment, and no explanation has been given of the subsequent neglect to pay in time to save the vote.

Next, Mr. Clancy has argued that the refusal to take the rates in Loughrey's case was unreasonable, and resulted in a penalty on the voter, as it compelled him to pay more in order to obtain his vote than he would have had to pay when he made the original offer. This result could not arise until the half-year's rates ending on January 1, were in arrear for three months, at least; and, having left the payment over until after that period, it is not unreasonable that the claimant should have to pay all that he owes at the date selected by himself for payment.

(1) 32 L. R. Ir. 191. (2) 18 L. R. Ir. 310.

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KENNEDY v. BUCHANAN. LOUGHREY v. SAME.

WALKER, L. J. :—

I agree. The words of the statute are clear: "Has *bona fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the premises up to the preceding first day of January." In the way these words are used, I think that *Kenmare* v. *Supple* (1) is a precise authority. There is a great difference between tender and payment, and there is reason in requiring payment, because it is a matter of public concern. At all events, the statute has prescribed payment as a condition precedent to the franchise in express terms, outside of which we cannot go.

HOLMES, L. J. :—I concur.

Solicitor for the appellants: *James Boyle.*

G. Y. D.

K. B. Div. 1903.

April 5.

THE EARL OF CORK AND ANOTHER *v.* THE COUNTY COUNCIL OF THE COUNTY OF CORK AND THE LORD MAYOR, ALDERMEN, AND BURGESSES OF THE COUNTY BOROUGH OF CORK (2).

Landlord and tenant—Lease—Covenant to indemnify landlord—Taxation—Poor rate—County and district charges—Union charges—Segregation—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37).

By a lease, dated 4th May, 1892, the plaintiffs demised to the late Board of Control certain lands, subject to a rent made payable "over and above all rates, taxes, assessments, and impositions whatsoever now payable, or hereafter to be imposed by Act of Parliament, or otherwise, on landlord or tenant in respect of said premises (landlord's proportion of poor rate, public water rate, and income tax only excepted)." Under the Local Government (Ireland) Act, 1898, the district in which the lands so demised were situated became an urban district, and the lease became vested in the defendants.

The plaintiffs were rated upon half the rent payable to them under the

(1) Vern. & Scriven, 1. (2) Before PALLES, C.B., and GIBSON, J.

lease, on the basis that the premises were demised for public purposes, and four demand notes for two years' poor rate up to February, 1901, were served upon the plaintiffs, and the amount due thereunder paid by them.

On Case Stated by the Judge of Assize on a County Court appeal, where the plaintiffs claimed repayment of such proportion of the amount so paid by them as did not consist of union charges:—

Held, that the plaintiffs were entitled to recover such proportion of the new poor rate as consisted of county and district charges.

Semble: In such a case the poor rate is divisible, that portion of it described as union charges being "of the same nature" as the former poor rate.

CASE STATED for the opinion of the King's Bench Division by the Right Hon. Mr. Justice Gibson on the hearing before him, at the Spring Assizes, 1903, for the county of Cork, East Riding, of a civil bill appeal by the defendants from a decree given by his Honour the County Court Judge in an action brought to recover £14 15*s.* money paid by the plaintiffs as landlords in respect of certain rates. The case stated was to the following effect:—

By lease, dated 4th May, 1892, made by the plaintiffs to the Commissioners for the general control and correspondence and for the superintending and directing the erection, establishment, and regulation of asylums for the lunatic poor in Ireland, known as the Board of Control, part of the lands of Shanakill, in the county of Cork, were demised to the Board of Control for a term of 200 years at a yearly rent of £92 7*s.* 4*d.*, payable to the plaintiffs "over and above all rates, taxes, assessments, and impositions whatsoever now payable, or hereafter to be imposed by Act of Parliament, or otherwise, on landlord or tenant in respect of said premises (landlord's proportion of poor rate, public water rate, and income tax only excepted)"; and the said lease contained a covenant on the part of the lessees to pay the rent "clear over and above all taxes as aforesaid."

There was a second lease, dated 2nd July, 1892, between the same parties of another part of the lands of Shanakill at a yearly rent of £16 18*s.*, which contained like provisions.

It was admitted that the said leases became vested in the defendants under the Local Government (Ireland) Act, 1898.

The plaintiffs were rated on half the rent on the basis that the premises were demised for public purposes, and four demand

K. B. Div. notes for two years' poor rate up to February, 1901, were served upon the plaintiffs and paid by them.

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The particulars of the poor rate contained in the demand notes were in the following form:—

CORK.

GENERAL DISTRICT POOR RATES FOR THE YEAR ENDING 28TH FEBRUARY, 1901.

Rates in the Pound in this Rural District in respect of

	County Charges.*			Union Charges.			District Charges.			TOTAL.		
	s.	*d.*	dec.	*s.*	*d.*	dec.	*s.*	*d.*	dec.	*s.*	*d.*	dec.
Levied on Agricultural Land . . .	0	11	74	1	1	82	0	6	14	2	7	70
Levied on other Hereditaments . .	0	3	00	2	5	00	1	3	00	4	11	00
Deducted in respect of Agricultural Grant	0	3	26	1	3	18	0	8	86	2	3	30

* The County Charges include Half-penny in the £ for Technical Education.

For the plaintiffs it was contended, on the hearing of the appeal, that it lay upon the defendants to show what portion (if any) of the present poor rate was to be allowed them under the description of "landlord's proportion of poor rate"; that in the absence of the defendants so doing the plaintiffs were entitled to recover all the poor rate paid in respect of the premises; and that in any case the plaintiffs were entitled to be paid so much of the poor rate as consisted of county and district charges, which latter amount was all that was sued for in the present action.

For the defendants it was contended that the county at large and district charges comprised considerable items representing the old poor rate; that the Local Government (Ireland) Act, 1898, provided no means of segregating these items; that the poor rate under the said Act was entire; and that the plaintiffs had no right of recoupment for any part thereof.

The following questions were submitted for the decision of the Court:—

1. Were the defendants liable to pay the plaintiffs the proportion of the poor rate under the Local Government (Ireland) Act, 1898, consisting of county and district charges? and

2. Should the decree be affirmed, reversed, or varied?

H. D. Conner, K.C., and *Lawrence*, for the plaintiffs :—

The covenants by the lessees, which clearly distinguish between poor rate and county cess, are explicit, viz. to indemnify the landlords against all rates beyond those specially excepted, *i.e.* landlord's proportion of poor rate. No proportion of such rate can be described as the landlord's proportion, and we submit the defendants were bound to pay the entire poor rate. If, however, it be necessary to make any segregation of the various rates levied under the name of poor rate by the County Council, the *onus* rests upon the defendants, who have the materials enabling them to do so, to say what sum represents expenses formerly raised by the old poor rate. A covenant to indemnify a landlord applies as well to rates made on half rent as to those on lands and buildings : *Greene* v. *Thornton* (1).

The expenses of the guardians of a union, strictly so called, were expenses for the relief of the poor ; all these expenses are comprised in union charges, and the duties of the guardians were not affected by the Local Government Act, 1898, except so far as relates to the levying and collecting of poor rate in so much of a county as was not comprised in an urban county district : sections 6 and 43 of the Local Government (Ireland) Act, 1898.

The provisions in the Local Government Act, 1898, making all expenses raisable by a rate called poor rate were never intended and did not operate to change the liabilities of landlord and tenant under covenants in existing leases, so as to throw upon the landlord expenses which he had never previously borne. *Duggan's Estate* (2) leaves the question open.

The poor rate may be indivisible as regards the person who pays it, but not as between him and others who may be liable to indemnify him. See section 54, sub-section 11.

Matthew J. Bourke, K.C., and *Hoare*, for the defendants :—

The Local Government Act, 1898, created no new tax. Poor rate is now to all intents and purposes a rate of the same nature and with the same incidence as the old poor rate, which by the

(1) 16 L. R. Ir. 381. (2) [1900] 1 I. R. 68.

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terms of the leases the plaintiffs are bound to pay. Poor rate is substituted for grand jury cess and county cess in all Grand Jury and other Acts: Privy Council Order of 30th January, 1899, Art. 3, 11. Sect. 54 of the Local Government Act, 1898, does not extend to the present case. All union charges are applicable to matters formerly provided for by the old poor rate. District and county charges comprise old poor rate and county cess charges. Thus county charges include the cost of applotting all rates and collector's poundage; the superannuation of former poor rate collectors; expenses under the Registration Acts and the Juries (Ireland) Acts, 1871 to 1894; expenses under the Diseases of Animals Act, 1894; compensation to officers under the Explosives Act; expenses under the Technical Instruction Acts; salaries of all county officials, and the cost of the staffs in the several County Council offices who perform duties in part new and in part formerly paid for out of poor rate and county cess.

Sanitary expenses (general and special), expenses under the Labourers Acts, and burial-ground expenses are raised as district charges, and not as union charges. The salaries of officials and office expenses of District Councils, and the election, law, and other expenses of District Councils are paid in respect of duties and matters in part new and in part previously paid out of poor rate and county cess, each official, so far as he acts for the District Council, being paid a bulk salary for his entire work. District charges also include the cost of maintenance of all roads and the execution of all public works throughout the county, either wholly or partially chargeable to the district. We submit, therefore, the defendants are not liable for either district or county charges. Assuming that the defendants could be made liable in respect of any portion of district charges or county charges, the *onus* rests on the plaintiffs of proving that these are severable into portions representing the old county cess and the old poor rate. The Act provides no means for such segregration, nor does it contemplate it for any purpose. The question is one of general principle; and as the defendants are sued, not as the rating authority, but as the persons representing the lessees' interest in the leases, their character as rating authority does not affect their legal liability

or throw upon them the burthen of segregating the poor rate, which we submit is one entire rate, and cannot be segregated.

[The following cases were cited:—*In re Mundy's Estate* (1); *In re Duggan's Estate* (2); *M'Daid* v. *Galbraith* (3); *Morrogh* v. *Hall* (4); *O'Connell* v. *Tralee Commissioners* (5); *Brewster* v. *Kitchell* (6); *King* v. *Gas Light and Coke Company* (7); *Sion College* v. *London Corporation* (8); *Malton* v. *West* (9); and reference was made to the following enactments:—6 & 7 Wm. 4, c. 116, s. 153; 1 & 2 Vict. c. 56, ss. 63, 71, 74; 12 & 13 Vict. c. 104, s. 10; 15 & 16 Vict. c. 63, ss. 12, 33; 17 Vict. c. 8, s. 2; 19 & 20 Vict. c. 63, ss. 1–4; Local Government (Ireland) Act, 1898, ss. 6, 7, 9, 33, 43, 44, 45, 52, 54, 96, 110; Local Government (Ireland) Act, 1900, s. 3, ss. 3; Local Government (Ireland) Act, 1901, s. 1, ss. 1.]

Cur. adv. vult.

May 1.

PALLES, C.B.:—

The question in this case is as to the liability of the defendants to indemnify the plaintiffs against portion of the poor rate, which it is to be taken was duly assessed upon half the rent payable to them under a lease made before the passing of the Local Government Act, 1898.

By that lease, which bears date the 4th May, 1892, the plaintiffs demised to the late Board of Control certain lands in the county of Cork, in a district which under that Act became, and when the rate was struck was, a rural district.

Under the same Act the lease became vested in the defendants.

Whilst the premises were in the possession of the Board of Control they were occupied for Crown purposes: *Harte* v. *Holmes* (10); and it is to be taken that the purposes for which they have been since used by the defendants are public purposes within the meaning of the Act 17 Vict. c. 8. Consequently the

(1) [1899] 1 I. R. 191.
(2) [1900] 1 I. R. 68.
(3) [1901] 2 I. R. 490.
(4) 32 L. R. Ir. 218.
(5) *Ibid.* 198.
(6) 1 Salk. 198.
(7) 8 B. & C. 54.
(8) [1901] 1 Q. B. 617.
(9) I. R. 11 C. L. 525.
(10) [1898] 2 I. R. 656.

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Palles, C.B.

persons rateable for the poor rate in respect of them were, at the time of the execution of the lease, and since have been, the plaintiffs, and the rate is assessed upon half the rent payable to them under the lease.

By the lease the rent is made payable "over and above all rates, taxes, assessments, and impositions whatsoever now payable, or hereafter to be imposed by Act of Parliament, or otherwise, on landlord or tenant in respect of said premises, landlord's proportion of poor rate, public water rate, and income tax only excepted."

There is no doubt that, as the law stood at the time of the execution of this lease, these words involved a covenant by the lessees to indemnify the landlord against the payment of grand jury cess.

Under the operation of the Local Government Act, 1898, poor rate and grand jury cess, as separate assessments, ceased to be leviable upon these premises; and the sums required for the purposes to which those two former rates were applied are, by sect. 51, sub-sect. 5, of that Act, directed to be raised by means of a new rate, which, no doubt, is called "poor rate," but which in its nature is not identical with the rate which, at the time of the execution of the lease, was known as poor rate. This rate is one which, within the words of the provision in the lease, has been thereafter "imposed by Act of Parliament on the landlord in respect of the premises," and is, therefore, one against which the defendants are bound to indemnify the plaintiffs, unless it is to be deemed "poor rate" within the meaning of that expression in the provision of the lease which I have read.

The plaintiffs paid the entire of the rate, and are willing themselves to bear the portion of it which consists of "union charges"; and brought this civil bill to recover the residue of the amount they so paid—that is, the amounts levied for county at large charges and district charges.

These charges are levied for purposes, *inter alia*, for which grand jury cess was formerly levied; and the defendants contend that the effect of the Act of 1898 is that, notwithstanding the contract of the parties, and against its express provision, the

plaintiffs are now, as between them and the defendants, bound to pay the rates for these purposes.

Construing the lease by the law which existed when it was executed, it draws a clear distinction between poor rate and county cess. The liability for these two assessments is, by the lease, differentiated, and indeed contrasted; and any rate for the purposes of those two former assessments cannot, either in law or common sense, answer the description of "poor rate" in the lease. I should have thought this clear on principle, and not to require any authority; but the authorities appear to be uniform in support of it.

In *Brewster* v. *Kitchell* (1) it was held that a covenant to discharge from taxes extended to subsequent taxes *of the same nature*, but not to taxes of a different nature.

In *King* v. *Gas Light and Coke Company* (2) the question arose upon 7 Geo. 3, c. 37, which enacted that certain land should be "free from all taxes and assessments whatsoever." The question was whether poor rate was within those words; and Bayley, J., says: "The exemption may be considered analogous to a covenant to pay taxes, which applies to old taxes, or others *substituted* for them, but not to taxes entirely new, unless there are express words to give it such extensive operation."

In *Sion College* v. *London Corporation* (3) the question was whether a rate under the City of London Sewers Act, 1848, some, but some only, of the objects to which it was to be applied being of a kind for which rates were made at the time of the passing of an Act of Geo. 3, was, within the expression contained in the Act, "free from all taxes and assessments whatsoever." It was held that the new consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption. A. L. Smith, M.R., said: "The result of the decisions . . . is that the Act only created an exemption from taxes and assessments then in existence, and not from substantially new ones, coming into existence at a later date. In my view, this consolidated rate is substantially new. I agree

(1) 1 Salk. 198. (2) 8 B. & C. 54. (3) [1901] 1 K. B. 617.

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that in it are some incidents which would appertain to the old rates in existence in 1766; but I cannot look at the wide purposes of the consolidated rate without seeing that it was substantially a new rate"; and the opinions of the Lords Justices were to the same effect.

The question, therefore, to be determined here is, whether the new "poor rate," taking it as a whole, is a rate of the same nature as the poor rate which existed at the time of the lease, under 1 & 2 Vict. c. 56. Two arguments have been urged upon us in support of the affirmative of this proposition.

The first is, that it is called "poor rate" in the Act, and that, by the Privy Council Orders made under the Act, various sections of the Grand Jury Acts have been altered by substituting therein the words "poor rate" for "grand jury cess."

I attach no importance whatsoever to this argument. It was necessary that the new rate should receive some name; and the question must be determined, not by its name, but by its nature and character, as derived from the provisions of the statute which created it. The alterations effected by the Privy Council Orders did no more than apply the provisions of the specified sections of the Grand Jury Acts to the new rate. It is not pretended that any of those sections involve any change in the liability created by the lease.

The second argument was that the effect of the Act of 1898, taking it as a whole, was to make the new assessment "poor rate" for all purposes, although it involved an alteration of pre-existing contracts; and that if a person who was onerated by that construction could not bring himself within the 54th section, which provided relief in certain cases of existing tenancies, but does not extend to the present, he should himself bear the burthen thus imposed upon him. In support of this contention cases of the class of *Malton* v. *West* (1) were cited.

In my opinion, such cases have no application to the present. In them there was a contract or a liability in respect of poor rate, which doubtless meant poor rate as it then existed. By a subsequent Act the Legislature authorized the raising by an additional poundage (which the Court thought was to be deemed part of the

(1) I. R. 11 C. L. 525.

existing poor rate) of moneys for purposes for which rates were not theretofore leviable at all. The Act did not transfer an existing liability under a contract from one person to another.

This brings me to the construction of the Act as a whole. Does it or does it not show an intention to transfer, in a case such as the present, from the lessor to the lessee, the liability for the rate for what were formerly grand jury purposes, but which are now comprised within the purposes for which county at large and district charges are leviable?

To effect such an alteration of liability under a contract by a statute in which no compensation is provided for the party onerated is wholly foreign to the usage of the Legislature, and an intention to do so must be shown to demonstration, either by express words in the statute, or by an absolutely necessary implication.

Now, as I read the Act, there are no express words whatsoever indicating such an intention, and the object intended to be accomplished by the Act does not require any alteration whatever in the liability under the contract here. To take the second point first, the main purpose of the financial provisions of the Act was to extinguish the liability of landlords to poor rate in respect of agricultural land, and to provide for the rating authorities in lieu thereof certain payments out of a grant called the "Agricultural Grant," which is created by section 48. Then, as to express words, the only section which can by possibility be relied upon is the 52nd, by which the incidence of poor rate is in certain cases altered, and by which it is enacted that, except in certain cases, of which the present is one, poor rate shall be made upon the occupier, and not upon the landlord. The words of exception, however, include rates, the subject-matter here, on a half rent under section 63 of the Poor Relief (Ireland) Act, 1838, and the enactments amending the same. The section then provides that in such cases "it," *i.e.* the poor rate, "shall continue to be *so* made," *i.e.* made as heretofore. This first sub-section deals with the person to be rated. It does not alter or purport to alter contracts. The latter purpose is effected by the next sub-section. It (sub-sect. 2) enacts: "The *occupier* of a hereditament shall not be entitled to deduct from his rent any part of the poor

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rate, and any contract to the contrary respecting such deduction shall be void; subject, nevertheless, to the exceptions in this Act, and to the provisions hereinafter contained respecting occupiers under existing tenancies." The provisions last referred to are those contained in section 54, which deals exclusively with occupiers, and not with lessors rated in respect of half rents.

Now, this sub-section 2 has no application whatever to the present case. This is the case, not of a rated occupier, but of a rated lessor. The sub-section, as framed, is just, and in accordance with the usage of Parliament, because its subject-matter and that of section 54 are co-extensive, and the latter sections provides compensation for occupiers under existing tenancies whose contracts are by the Act altered to their prejudice.

In the cases, therefore, in which the Legislature intended to alter existing contracts, we have them doing so by express words, and accompanying them by such provisions as they thought just by reducing the occupiers' rents by the amount of the increased burthen estimated in such a way as was consistent with the general scheme of the Act. We are asked to hold that the Act effects alterations in a different class of contracts, contracts which are not within the words used, in respect of which there are no compensating provisions, and the alteration of which is not necessary for effectuating the policy of the Act.

I am therefore of opinion that whilst the words "shall continue to be so made" impose upon the plaintiffs a liability to be rated for a new poor rate, the Act does not interfere with or affect the contract contained in the lease, that as between them and the lessees they shall be indemnified by the latter for any charges not of the description referred to in the lease.

Apart from this broad ground upon which I base my judgment, it could be shown that many absurdities would follow from the construction contended for by the defendants. I shall mention but one. A tenant under a contract made after the Landlord and Tenant Act of 1870, which did not contain any express provision as to county cess, would be in a worse position than are the defendants, who, by express contract, agree to pay it. Such a tenant would be entitled, under sect. 54 of the Act of 1898, to a deduction of half only of the county cess, and that half is limited for the

landlord's benefit by reference to the "standard rate," whilst the tenants here, who have covenanted to pay the entire, would be free from the whole of it.

Again, the fact that for some purposes the Legislature treats the poor rate as being composed of various separate items which it directs to be separately stated in the rate, and in the notice of it, is not to be overlooked. Were the considerations already adverted to not sufficient, I could show from various other provisions of the Act that an intention is apparent to interfere as little as possible with existing liabilities (as, for instance, in relation to rates for grand jury purposes in boroughs, as to which I have already stated my views at length in the Trinity College case), and never to do so without providing some relief to the persons affected. I, however, deem it unnecessary to do so.

Upon the whole, I am of opinion that the whole of the new poor rate does not answer the description of poor rate in the lease, and consequently that if the new rate be not divisible for the purpose in hand, the defendants are bound to indemnify the plaintiffs against the entire of it. If, on the other hand, it be divisible, the plaintiffs are entitled to recover all they seek by their civil bill, viz. the portion of the rate which does not consist of union charges.

In this view it is unnecessary to decide whether the new rate is or is not divisible for this purpose, but to save further litigation between the parties I think it right to express my clear opinion that it is so divisible, and that the portion of it described as "union charges" is a rate "of the same nature" as the former poor rate, to use the words in *Brewster* v. *Kitchell* (1), or, in the words of Bayley, J., "one substituted for it, and not an entirely new tax."

These "union charges" are the expenses of the guardians of the union, and it was the expenses of the guardians of the union that were formerly raised by the poor rate. It is true that some of the expenses which in 1892 were payable out of poor rate are not now within "union charges," but still every purpose for which "union charges" are now raised are purposes which at the time of the lease were poor rate purposes.

(1) 1 Salk. 198.

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As regards the shifting of some of the expenses formerly defrayed out of the poor rate to the county at large charges, the effect of the Act of 1898 is the converse of that of the Act considered in *Malton* v. *West* (1). In the last quarter of the last century Parliament imposed upon the poor rate many expenses for purposes which were not strictly poor law purposes. They imposed them upon this rate probably because it was the only rate to part of which landlords were liable, and because Parliament thought that landlords as well as tenants should contribute to those expenses. This governing reason ceased to operate in 1898, when the Legislature relieved the landlords from all rates save in a few exceptional cases of which this is one. This occasion seems to me to have been seized by the Legislature to re-adjust the duties of the poor law and county authorities, and in that re-adjustment to transfer from the guardians of the poor to the new county authorities the duties in respect of which these anomalous expenses had been imposed upon the poor rate. As the Legislature had formerly by statute extended the duties of the guardians beyond what were strictly poor law purposes, and did so, as held in *Malton* v. *West* (1), without altering the identity of the poor rate, so, by the Act of 1898, they reduced the duties of the guardians to their legitimate limits, and thereby reduced their expenditure, but they did so, in my opinion, without altering the identity with the old poor rate of so much of the new poor rate as consists of "union charges." The proper function of poor rate from 1838, when it was imposed, to 1898, was to provide a fund for the expenses of the guardians in the execution of their duties, as they from time to time existed, and the reduction of those duties in 1898 no more changed the character of the rate than did the imposition of the additional duties the subject of the decision in *Malton* v. *West* (1).

In arriving at this conclusion, I have not overlooked the decisions of our Court of Appeal in *Duggan's Estate* (2) and *M'Daid* v. *Galbraith* (3). Neither of them, however, is in point here, as each was a decision as to the effect of the Act of 1898, not on an existing contract, which is the present case, but on a previous statute. The considerations applicable to these two

(1) I. R. 11 C. L. 525. (2) [1900] 1 I. R. 68. (3) [1901] 2 I. R. 490.

questions are wholly different. Further, the only decision in *Duggan's Estate* (1) was that after the Act of 1898 something existed which answered the description of poor rate in the Tithe Rentcharge Act, just as I am of opinion that there is something answering the same description in the contract here. I not only yield to this decision, as I am bound to do, but I entirely concur in it. In *M'Daid* v. *Galbraith* (2) the fact that the rate was indivisible between the rating authority and the person charged was material, and, in addition, assistance in ascertaining the intention of the Legislature upon the matter in question there was derived from sect. 66, which does not affect the present case.

I am of opinion that the first question should be answered in the affirmative, and that the decree should be affirmed. The defendants must pay the costs of the case.

GIBSON, J., concurred.

Solicitor for the plaintiffs: *R. Deyos.*
Solicitors for the defendants: *Exham & Son.*

R. ST. J. C.

HEATH AND OTHERS *v.* CULLEN (3).

Appeal. 1902. July 3, 7.

Landlord and Tenant—Land Law (Ireland) Acts, 1887 *and* 1896 (50 & 51 *Vict. c.* 33, *s.* 7; 59 & 60 *Vict. c.* 47, *s.* 16)—*Ejectment for non-payment of rent—Form of notice and summary—"Caretaker notice"—Statement of rent due—More than two years' rent due.*

In an ejectment for non-payment of rent when more than two years' rent is due, the full amount of rent due may be set out in the caretaker notice served under section 7 of the Act of 1887, notwithstanding that the notice contains no reference to the privilege conferred on the tenant by section 16 of the Act of 1896, on payment of two years' rent.

APPEAL by the plaintiffs from an order of the King's Bench Division, made on June 30th, 1902, refusing an application made

(1) [1900] 1 I. R. 68. (2) [1901] 2 I. R. 490.
(3) Before LORD ASHBOURNE, C., and FITZ GIBBON and HOLMES, L.JJ.

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on behalf of the plaintiffs for a direction that a writ of possession in this action should issue for the recovery of possession of the lands and premises in the writ of summons mentioned, notwithstanding that the notice under section 7 of the Land Law (Ireland) Act, 1887, served upon the defendant on October 16th, 1901, set out that there were four and a-half years' rent due to March 25th, 1901, without mentioning that under the provisions of section 16 of the Act of 1896 the defendant was enabled to pay, tender, deposit, or lodge under sections 60 to 71 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, the sum of two years' rent instead of the sums therein respectively required to be paid, tendered, deposited, and lodged in respect of the rent and arrears, exclusive of costs, upon which tender, payment, deposit, or lodgment the defendant would have been in the same position under those sections as if two years' rent were the sum due for rent up to the date of the commencement of the proceedings in ejectment.

The plaintiffs had recovered judgment for possession of the lands mentioned in the writ of summons for non-payment of rent, four and a-half years' rent being due. On October 16, 1901, they served the usual "caretaker notice" exactly in the form prescribed by the Act of 1887, stating that the tenant would be entitled to redeem on payment of four and a-half years' rent, but making no reference to the privilege conferred on the tenant by section 16 of the Act of 1896.

Garrett Walker, for the appellants, cited *Parker* v. *Boyd* (1); *Kane* v. *Mulholland* (2); *Arthur* v. *M'Geady* (3); *Gaffrey* v. *Bailey* (4); 23 & 24 Vict. c. 153, ss. 60–71; 50 & 51 Vict. c. 33, s. 7; 59 & 60 Vict. c. 47, s. 16.

Cur. adv. vult.

July 7.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from the King's Bench Division, and raises a very important question on the administration of the Land Laws.

(1) 33 I. L. T. R. 39, 41.
(2) 28 L. R. Ir. 59.
(3) 32 L. R. Ir. 510.
(4) 17 I. L. T. R. 89.

Mr. Garrett Walker having, on the part of the landlord, moved for a writ of possession of the lands and premises in the writ of summons mentioned, was refused on the ground that the notice served under section 7 of the Land Act of 1887 set out that there were due four and a-half years' rent to 25th March, 1901, without mentioning that under the provisions of section 16 of the Land Law (Ireland) Act, 1896, the defendant was enabled to pay, tender, or lodge the sum of two years' rent instead of the sums mentioned in sections 60 to 71 of the Act of 1860 (commonly called Deasy's Act).

The plaintiff in the notice which he had served under section 7 of the Act of 1887 had followed the practice which had been uniformly adopted since its enactment, and which had remained unchanged after the passing of the Act of 1896. It is thus obvious that the decision now under appeal is of the highest practical importance, and if it is upheld, it must have very wide consequences in reference to the legality of notices which have for years been in the form now held to be insufficient and inadequate.

Section 7 of the Act of 1887 requires that the notice should "state truly the exact amount *claimed* by the plaintiff as payable for redemption"—not "the exact amount payable for or required for redemption"—but the amount *claimed* by the landlord. The form of notice given in the schedule to the Act states that the holding can only be redeemed by the payment within the statutory period of the rent, arrears, and costs *as* declared by "the judgment or decree." Even when the year's rent of a holding had been paid since the date of the decree (which stated that two years' rent was due), it was held in *Kane* v. *Mulholland* (1) that a notice and summary founded on a County Court decree in ejectment for non-payment of rent were valid and sufficient to determine the tenancy, as they stated the amount of rent and costs, as in the decree mentioned, although they ignored the subsequent payment of one year's rent. A similar decision, *Gaffrey* v. *Bailey* (2), was given under the 65th section of the Landlord and Tenant Law Act (Ireland), 1860, when it was held that the requirement that upon every writ of *habere* and warrant under a decree for possession

(1) 28 L. R. Ir. 59. (2) 17 I. L T. R. 89.

Appeal. 1902. HEATH *v.* CULLEN. Lord Ashbourne, C.

in any ejectment for non-payment of rent there should be a statement of the amount of rent due, was satisfied by a statement of the rent due at the time of the judgment or decree, even although part of it had been paid or otherwise discharged before execution.

It has been assumed with practical uniformity that these decisions were well founded, and that there was nothing in the 16th section of the Land Law Act of 1896 to vary or qualify them. In 1898 a Circuit decision, indeed, was given by Mr. Justice Madden at Lifford (reported only in a short footnote at p. 41 of the 33rd vol. of the Irish Law Times Reports), reversing a decree in ejectment given by Judge Webb, on the ground that the notice under section 7 of the Land Law (Ireland) Act, 1887, was bad, since that section required that "the exact amount claimed by the plaintiffs as payable for redemption" should be truly stated; and by reason of section 16 of the Land Law (Ireland) Act, 1896, the amount so payable for redemption was then two years' rent, and the notice should have so stated. But this decision was, I think, little known, and very little, if at all, acted on. When the parties who had won before Mr. Justice Madden brought civil bills before Judge Webb claiming damages for trespass in the execution of the decrees which had been set aside, that learned Judge gave one plaintiff a shilling and the other 10*s.* 6*d.*, and refused both any expenses, and took the opportunity of giving a very able and considered judgment on the topics now discussed before us. The judgment pointed out strongly that the Act of 1896 did not require that the benefit which it conferred upon the tenant should be communicated to him by the landlord. But this important question now before us was never, I believe, formally raised for discussion in the Superior Courts until the present case. It is said that on the true construction and application of the Act of 1896 we should change all the existing practice, and hold that the notices served under section 7 of the Act of 1887 and in the form in its schedule are to be regarded as inadequate and insufficient, and I suppose as nullities, exposing those who relied on them to actions of trespass. I note, in the first place, that the Act of 1896 made some changes in the Act of 1887, and repealed some of its provisions, but it left absolutely untouched the whole of section 7, and did not indicate in any way that the

notice so often referred to should be in any particular altered or varied. A clear and large benefit was conferred on the tenant by the 16th section, collateral with the Act of 1887. If he pays two years' rent, he may sue out a writ of restitution, but the balance of the rent may be recovered as a debt, and the tenant remains liable to the costs under the Act of 1860. These are privileges given to the tenant, without a hint that any obligation is cast on the landlord to communicate them by notice or otherwise to the tenant.

In this case the notice specified in section 7 was served by the landlord in the form set forth in the schedule, stating the four and a-half years' rent mentioned in the decree as the amount *claimed* by the plaintiff as payable for redemption of the holding.

At first the King's Bench Division Judges were in favour of upholding the existing practice, and assented to Mr. Walker's motion, but upon further argument they gave the decision under appeal.

I am entirely unable to hold that the notice which in my opinion complied with the terms of the statute is inadequate and void in consequence of the provisions of a statute passed years after, which deliberately left untouched the mechanism which had been followed, and which did not expressly or by implication cast any duty upon the landlord to communicate its own provisions.

It may be well worth consideration to think carefully over the feasibility of framing some rule which would have the effect of bringing more knowledge home to the tenant of the existence of the provisions of section 16 of the Act of 1896.

But we have now only to deal with the legality and efficacy of the notice served here under section 7 of the Act of 1887, and I am entirely of opinion that the first view of the King's Bench Division Judges was correct, and that the order now under appeal was erroneous. I therefore think that the appeal should be allowed.

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FITZ GIBBON, L. J. :—

I concur. On two main grounds I think that the appeal should be allowed, and that the order asked by Mr. Walker should be granted.

(i.) The notice which the order of the King's Bench Division created as null and void is a notice in the very terms of the statute under which it is served.

(ii.) The terms of the notice are true, because the amount which it states to be "claimed" is the amount which is in fact claimed to be due.

That is the substance of the case. But, in form, the notice is said to be null and void because it does not tell the tenant of an Act of Parliament which modifies the effect of the notice in his favour. I am not aware of any other instance in which it has been held (*a*) that a person in whose favour special legislation exists is not to be presumed to know of it; or (*b*) that a party against whose interest a special provision has been made by law must call the attention of the opposite party to that law, under pain of invalidating what is done by himself under the very terms of it.

On the Acts of 1860, 1887, and 1896, taken together, the tenant is allowed to pay a less amount than the rent due—not in satisfaction of the debt for rent, but as the condition of redeeming the tenancy. To understand the legislation we must begin with the Act of 1860, section 65. "Upon every writ of *habere facias possessionem* and warrant under a decree for possession in any ejectment for non-payment of rent there shall be a statement of the amount of rent then due." Under this section the landlord had to state on the writ the full amount due, and the statement so made was the foundation for the steps which the Act left open to the tenant, viz. payment or lodgment of the rent, and an application for a writ of restitution.

The object of the Act of 1887 was to enable the landlord to serve a notice in place of evicting the tenant, and then afterwards to put himself into the same position as if he had evicted him. Section 7 directs that the notice "shall state truly the exact amount claimed by the plaintiff as payable for redemption." As the law then stood, and as it continued to stand until 1896, this

was the same amount which the tenant should pay or lodge under the Act of 1860, in order to suspend execution or to obtain a writ of restitution. The Act of 1887 required the same amount to be truly and exactly stated in the notice which the Act of 1860 had required to be stated on the writ. But while the Acts of 1860 and of 1887 required the entire debt to be discharged before relief could be given to the tenant, the Act of 1896 enabled the tenant to recover back the possession by paying a smaller sum, in a special way and for a limited purpose, but not in satisfaction or discharge of the debt.

> "When the rent in arrear exceeds two years rent, the tenant may pay, tender, deposit, or lodge, under sections 60 to 71 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, the sum of two years rent instead of the sums therein respectively required to be paid, tendered, deposited, or lodged in respect of rent and arrears, exclusive of costs; and upon such tender, payment, deposit, or lodgment the tenant shall be in the same position under those sections as if two years' rent were the sum due for rent up to the date of the commencement of the proceedings in the ejectment; and the balance of the rent due to that date shall be recoverable by the landlord as if the same were a debt due to him by the person legally liable therefor, but shall not be recovered by ejectment for non-payment of rent or by distress."

Nothing in this section expressly repeals or alters anything in or anything to be done under the Act of 1887, section 7. The Act of 1896, section 16, leaves the landlord at liberty to go on as before, but it is an enabling section for the tenant. If he owes more than two years rent, it gives him the option of redeeming his tenancy by paying two years rent, leaving the balance to be recovered as an ordinary money demand. Nor is it only after service of an eviction notice under the Act of 1887, sect. 7, that this option is given. It may be exercised at any of the earlier stages in an action for recovery of land for non-payment of rent, at which, under sections 60 to 64 of the Act of 1860, tender, payment, deposit, or lodgment of the full rent due would have enabled the tenant to stay proceedings. It is quite plain that at any of these earlier stages the tenant must avail himself of the provisions of section 16 of the Act 1896 without getting any notice of the effect thereof from the landlord, and under

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circumstances to which the objection which was made in this case could not possibly apply. This is a further proof that it was not intended by the Legislature to invalidate a proceeding for recovery of possession under an eviction notice in the terms prescribed by the Act of 1887, on the ground that the notice did not go on to explain that the Act of 1896 had conferred the privilege on the tenant of retaining the possession upon easier terms if he chose to avail himself of them.

HOLMES, L. J.:—

In *Kane* v. *Mulholland* (1) I considered, in conjunction with three members of the then Queen's Bench Division, what is the amount "claimed by the plaintiff as payable for redemption" that is to be stated in the notice prescribed by the 7th section of the Land Law (Ireland) Act, 1887. Other members of the Court as well as myself gave our reasons for holding that the amount thus referred to is to be the same amount as prior to the Act of 1887 would have been set forth in the writ of *habere facias possessionem* and warrant under a decree pursuant to the 65th section of the Landlord and Tenant Law Amendment Act (Ireland), 1860. We therefore held that where a sum had been paid on account of rent after the decree, the notice complied with the statute by stating the amount in the decree without any reference to the subsequent payment. In that case the question arose on a civil bill decree, which contains a statement of the amount of rent due, while a judgment in the Superior Court has no such statement. It seems to me, however, to follow from the reasoning of the Judges that in the case of a judgment the amount in the notice ought to be the sum due for rent as verified by the plaintiff's affidavit which is a necessary condition to his obtaining judgment. The practice, as settled by *Kane* v. *Mulholland* (1) has been acted on for years, and ought not to be lightly departed from; nor on further consideration do I see any ground for altering the views I then expressed. The portion of the Act of 1887 and the schedule thereto that related to the notice remain unrepealed and unaltered. The Land Act of 1896 enables the tenant to regain

(1) 28 L. R. Ir. 59.

possession of the holding on paying two years' rent, although he continues to be liable for arrears beyond this sum. Previous to the passing of that statute, if four years' rent were due, and half this amount were paid immediately after judgment, the entire sum, according to *Kane* v. *Mulholland* (1), could be inserted in the notice without affecting its validity, although the tenant could redeem by paying the remaining half. I think that the same principle applies where a public statute gives the tenant the right to be restored to possession on paying a smaller sum than what is actually due.

Solicitors for the appellants: *W. C. Hogan & Sons.*

G. Y. D.

M'ADAM, APPLICANT; HARVEY, RESPONDENT (2).

Appeal. 1902. March 12.

Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *sect.* 7, *sub-sect.* (1) —"*On, in, or about a factory.*"

A workman was employed, along with other men in the same employment, in putting down a flooring of cement in a house which exceeded 30 feet in height, and was constructed by means of scaffolding. The workman left the house to fetch a pickaxe from his employer's yard. On his way he slipped and fell, receiving injuries, in respect of which he sought compensation. At the hearing before the County Court Judge no evidence was given as to the exact spot where the accident happened, or as to how far it was from the building where the man was working:—

Held, that it lay on the applicant to show that the injury by accident arose out of and in the course of an employment "on, in, or about" the building, and that, not having discharged this *onus* by giving evidence of the exact locality where the accident happened, he was not entitled to compensation.

APPEAL from the decision of the County Court Judge of Fermanagh declaring a workman (the applicant) entitled to compensation to be paid by his employer (the respondent) under the Workmen's Compensation Act, 1897.

(1) 28 L. R. Ir. 59.

(2) Before SIR A. M. PORTER, M.R., and WALKER and HOLMES, L.JJ.

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The County Court Judge stated that three points had been raised before him by the employer: (1) that the building "on, in, or about" which the applicant was employed at the time of the accident in respect of which compensation was sought did not exceed 30 feet in height; (2) that the building was not being constructed by means of a scaffolding, or at all, at the time when the accident happened; and (3) that the employment of the applicant at the time of the accident was not "on, in, or about" the building in question.

The County Court Judge stated:—As to the first point, it appeared from the evidence and I found that the house was 30 feet 7 inches high from the ground level taken at one end of the back wall of the house to the ridge-tile, and 29 feet 9 inches at the other end of the back wall of the house. If the same measurements were taken at the front of the house, its height would be less than 30 feet. If the measurements were taken to the top of the chimney, the house would be over 30 feet high both in front and rere. I held that the house exceeded 30 feet in height.

As to the second point, the accident in respect of which compensation was claimed happened upon the 16th November, 1901. At that date the outside of the house had been completed, and the external scaffolding removed. But inside the house men were plastering the ceilings and walls, and there was a planking set up on trestles forming a stage to enable the men to reach the ceilings and upper portions of the internal walls, and men were engaged at such work on the said 16th November. I held, on these facts, that the house was being constructed by means of a scaffolding on that date.

As to the third point, the applicant had been in the respondent's employment practically continuously for twenty years. The house in question was situate in Mill-street, in the town of Enniskillen, and on the morning of the 16th November last the applicant went to the house in obedience to the respondent's directions to put down a flooring of cement in one of the rooms, not being a room in which any scaffolding then was such as is mentioned above. The applicant was apparently working with other men of the respondent's, and finding that there was only

one pickaxe, and that another was needed, he left the house and went towards the respondent's yard to fetch another. This yard is in the town of Enniskillen, and its exact distance was not stated in evidence, nor was any special importance rested upon its exact distance at the hearing by the solicitor for the respondent. The town is not large and is very compact, and from my knowledge of it I took it that the distance was short. On his way to the yard, the morning being frosty, the applicant when stepping from the roadway to the sidepath slipped and fell, dislocated his wrist, and broke his arm. Up to the date of the hearing (28th January, 1902), he had not been able to resume work.

I decided that in the above circumstances the employment of the applicant was "on, in, or about" the building in question at the time of the accident.

Note.—Since the hearing I have received a request from the appellant's solicitor for my notes, containing a statement that the yard above referred to is 200 yards from the house. I desire to say that no such measurement was proved at the hearing, in fact no measurement whatever was given.

Ronan, *K.C.*, and *C. W. R. Brady*, for the appellant (the employer).

Steen, for the respondent (the applicant).

SIR A. M. PORTER, M. R.:—

In this case the plaintiff has been declared entitled to compensation under the Workmen's Compensation Act, 1897, for injuries received by him while in the employment of the appellant. It appears from the statement of facts furnished by the County County Judge, from whose decision the appeal is brought, that the applicant had been in the appellant's employment for twenty years; that at the date of the accident for which compensation is claimed he went, in obedience to the appellant's directions, to a house which they were constructing in order to put down a flooring of cement in one of the rooms. For the purposes of the case this house may be taken to have been the "factory" or building within the meaning of the Act. The

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applicant was working in this house with some other workmen of the appellant's, and finding that there was only one pickaxe on the premises and that another was needed, he left the house and went towards the appellant's yard to fetch one. No doubt his doing so was strictly in accordance with his duty as the appellant's servant.

The yard is in the town of Enniskillen, but its distance from the house was not stated in evidence, nor does it appear that any special importance was attached to its exact position at the hearing before the County Court Judge, and I agree that this was not in itself material.

The Judge states as follows:—"The town is not large and is very compact, and from my knowledge of it I took it that the distance was short. On his way to the yard, the morning being frosty, the applicant in stepping from the roadway to the sidepath slipped and fell, dislocated his wrist, and broke his arm. Up to the date of the hearing (28th January last) he had been unable to resume work. I decided that in the above circumstances the employment of the applicant was 'on, in, or about' the building in question at the time of the accident." To this finding is appended the following note by the Judge:—"Since the hearing I have received a request from the appellant's solicitor for my notes, containing a statement that the yard above referred to is 200 yards from the house. I desire to say no such measurement was proved at the hearing, in fact no measurement whatever was given." Taking that as the only finding of fact upon the point, it appears to me to be equivalent to this: that no proof was given as regards the distance between the yard and the "factory" (that is the house where the work was being actually done), nor any as to the place where the accident happened save that it was in the town of Enniskillen.

The first question is, was there any decision by the County Court Judge that the accident happened "on, in, or about" the premises. The second question is, if so, was there any evidence to support that finding. I think the fair meaning of the case stated is that, although no evidence was given as to the place where the accident occurred except that it happened in Enniskillen, yet the learned Judge says in substance:—I know Enniskillen

to be a small town, and therefore the place where the accident happened cannot have been far from the house or "factory" where the man was employed. I take it that the distance was certainly short. Under these circumstances, I determined that the accident happened "on, in, or about" the premises.

In this state of things, obviously the question which at once arises is—On whom does the *onus* of proof lie? Plainly, I think, on the applicant. The statute does not give a general right to compensation, and then go on to negative exceptions. On the contrary, section 7 says:—"This Act shall apply *only* to employment . . . on, in, or about any . . . building." The right and the remedy are both statutory; and it is essential for the applicant to show that he comes within these words. It is equally consistent with the finding of the County Court Judge (as it must be understood), that the accident happened just outside the house or at the other extremity of the town. Feeling this difficulty, Mr. Steen sought to paraphrase the words "on, in, or about" by the words "at a short distance from," and if the words could properly be so paraphrased, the applicant, perhaps, on the finding of the Court as to the size of Enniskillen, might contend that he came within them. But these words have already received authoritative judicial interpretation in at least three cases. *Powell* v. *Brown* (1) shows that "in physical contiguity" or "in close propinquity" is the real meaning of the word "about" as used in the Act, and not "at a short distance from." *Fenn* v. *Miller* (2) is clear and instructive on this point. In that case the workman was employed in carting water to a mortar mill. The horse he was driving ran away, knocked him down, and injured him. The accident took place somewhere between 110 and 160 yards from the "factory," and it was held that there was no evidence on which the County Court Judge could properly find that the employment of the workman was "about" a "factory" within the meaning of the Act, the Court being of opinion that the accident did not happen in close propinquity to the factory. The borough of Enniskillen covers, according to Thom's Directory, above 129 acres, and contains upwards of 5000 inhabitants. The distance between two

(1) [1899] 1 Q. B. 157. (2) [1900] 1 Q. B. 788.

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points in Enniskillen *may* therefore be much greater than the distance mentioned in *Fenn* v. *Miller* (1). In *Cosgrave* v. *The Anglo-American Oil Company, Limited* (2), the accident occurred, as found by the Recorder, at some distance from the "factory," though within the ambit of premises held and occupied by the employers for the purposes of their business; and this Court held that it could not be said to have occurred "about" the "factory." Having regard to these cases, I cannot hold that the applicant has brought himself within the terms of the Act. He has not shown one of the essential matters of fact upon which his right depends, viz. that the accident befell him "about," that is, in close propinquity to the factory; nor has he shown any facts from such an inference can legitimately be drawn. On the contrary, it is, as I have said, consistent with his case as presented, that the accident might have happened either within a few yards from the house or at the other end of the town. I hold therefore that the applicant has not discharged the *onus* cast upon him, and that he has given no evidence on which the finding that the accident happened "on, in, or about" the premises can be sustained. It is important that it should be clearly understood that it devolves upon the applicant in all such cases to show where the accident occurred, and to bring himself by proof within the words of the statute.

The only matter I have felt any doubt about was as to whether we ought to have sent the case back to the County Court Judge with a direction to find the precise locality of the accident. But from the way the case is stated, and from the way it was treated in the County Court (where *Fenn* v. *Miller* (1) was cited on behalf of the appellant), I do not think that that course would be of any benefit to the applicant, while it might and probably would involve him in further useless expense. The appeal must therefore be allowed.

WALKER and HOLMES, L.JJ., concurred.

Solicitors for the appellant: *Alexander Irvine & Co.*
Solicitor for the applicant: *John F. Wray.*

G. Y. D.

(1) [1900] 1 Q. B. 788. (2) 34 I. L. T. R. 56.

THE ATTORNEY-GENERAL *v.* PATRICK M'CORMACK (1).

K. B. Div.
1903.
June 10, 19

Practice—Revenue—Pleading—Information—Defence—Plea of general issue.

A defendant to an information brought by the Attorney-General on the Revenue Side of the King's Bench Division to enforce payment of income tax is entitled to plead the general issue.

MOTION ON NOTICE.

By an information on the Revenue Side of this Division filed on the 27th April, 1903, the Attorney-General, prosecuting for His Majesty, alleged that the defendant was indebted to His Majesty in two several sums of £1 3*s.* 11*d.* and £2 16*s.* 6*d.*, assessed upon the defendant for the duties of income tax in respect of certain lands and hereditaments in the county of Roscommon for the year ending 5th April, 1902. The information concluded in these terms:—"Wherefore the said Attorney-General, who prosecutes as aforesaid, prayeth the consideration of the Court in the premises, and that the said sums of money so due, amounting in the whole to the sum of £4 0*s.* 5*d.*, may be adjudged to His Majesty."

Notice to plead to this information was served on the defendant on the 27th April, 1903; and on the 7th May, 1903, the defendant filed the following defence:—"The said Patrick M'Cormack does not owe and never did owe to His Majesty the several sums of money in the said information or any of them or any part thereof."

Counsel for the Attorney-General now applied for an order that this defence should be set aside on the ground that the same was irregular and embarrassing, and disclosed no legal defence to the information.

Coll, for the Attorney-General, in support of the motion.

(1) Before GIBSON and BOYD, JJ.

K. B. Div. 1903.

ATTY.-GEN. v. M'CORMACK.

June 13.

T. Sullivan, for the defendant.

The arguments of counsel and cases cited appear from the judgment.

Cur. adv. vult.

GIBSON, J. :—

This motion is purely a pleading motion; we know nothing of the real facts. The motion is rested on two grounds: (1) that the general issue is not admissible as a defence to a Revenue information; (2) that no defence at all is available, the only remedy of the defendant against an erroneous assessment being by way of appeal or case stated. It is conceded that the defence is substantially the old general issue of *nil debet* and *nunquam indebitatus*.

1. Mr. Coll, for the Crown, contends that at common law the general issue was never pleaded and never could be pleaded to a Revenue information; and also that the Common Law Procedure Act governed such informations, in which case the defence would be embarrassing.

As to common law, he urges that the general issue is an unknown form of pleading in Revenue cases; he relies on the old law as to pleading in intrusion cases, and refers to a precedent in Howard, vol. 1, p. 112. The passage from Howard has no bearing on the question before us. As to intrusion, the rule which required a defendant at common law to justify specially where charged with wrongful intrusion on Crown lands proceeded on considerations relating to the prerogative in cases where Royal title to land was involved: see Manning's Exchequer Practice, p. 199; Chitty on Prerogative, p. 333; *Attorney-General* v. *Churchill* (1). As to the supposed absence of precedent, the argument seems unfounded. I give a few examples. The general issue was pleaded to informations for not making a return: *Attorney-General* v. *Borrodale* (2); *Attorney-General* v. *Radloff* (3); *Attorney-General* v. *Sully* (4); to informations *in rem*: *Attorney-General* v. *Clerc* (5); to informations for arrears of assessed taxes: *Attorney-General* v. *Sewell* (6). I have looked into Manning, who

(1) 8 M. & W. 171.
(2) 1 Price, 148.
(3) 10 Exch. 84.
(4) 4 H. & N. 769; 5 H. & N. 711.
(5) 12 M. & W. 640.
(6) 4 M. & W. 77.

is to the same effect, but I have not been able to refer to Fowler's Exchequer Practice, two volumes, a book of some importance, cited in some of the cases. The practice seems to have been quite settled at common law: see Chitty on Prerogative, p. 366, as to extent cases. The necessity of such a comprehensive plea in Revenue cases was obvious. At common law double pleading was not allowed, though the prerogative of the Crown exempted it from this restriction. The legislation which authorized double pleading did not affect Crown suits: *Attorney-General* v. *Allgood* (1); *Attorney-General* v. *Donaldson* (2); Bacon, Abridgment, Prerogative, E. 7; the argument of the Attorney-General in *Attorney-General* v. *Churchill* (3). Hence it was essential for the protection of the subject that the general issue should be pleadable whether the information is for a penalty or *in rem* or for a money demand.

Next, were Revenue cases in the Exchequer within the Common Law Procedure Acts? Mr. Yeo informs me that in the forty years of his experience in the Exchequer it was always assumed that the Revenue procedure was unaffected by those Acts. On its obvious construction the statute of 1853 does not relate to such Crown suits. The Crown is not referred to, and is not bound by the Act. An information, though preceded by a writ, is not a summons and plaint, and a so-called English information was not apparently preceded by a writ at all. In the English statute 28 & 29 Vict. c. 104, s. 31, certain provisions of the English Common Law Procedure Act are extended to the Revenue Side—a decisive proof that previously Revenue proceedings were not governed by that Act. The way in which the Judicature Rules deal with existing Revenue practice further shows the previous state of the law. The statutes 28 & 29 Vict. c. 104, and 22 & 23 Vict. c. 21, contain provisions for altering and improving Revenue procedure; but they do not extend to Ireland. The statute 18 & 19 Vict. c. 90, which does apply to Ireland, enabled rules to be made regulating procedure, but counsel informed us that this power was never exercised. The pleading rules under the Judicature Act have not been extended to Revenue suits. Counsel has

(1) Parker, p. 1. (2) 7 M. & W. 422. (3) 8 M. & W. at p. 172.

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Gibson, J.

not been able to refer to any enactment or rule modifying the ancient forms and principles of pleading defences at the Revenue Side, which must have been the same at common law in Ireland as in England, though I am not aware of any reported Irish precedent. In *Attorney-General* v. *M'Donnell* (1) the form of plea is not given. Since the Act of 1880, c. 19, suits must have been rare, as questions of law on appeals are now disposed of on cases stated under section 59, though section 111 contemplates proceedings for arrears. The reported cases where there were informations relate to the earlier statutes, and the question of liability was raised by suing for penalties (as in *Sully's Case* (2)); or for arrears (as in *Sewell's Case* (3)); or by case stated in the suit (as in *Attorney-General* v. *Black* (4)); *Attorney-General* v. *Lancashire and Yorkshire Railway Company* (5); *Attorney-General* v. *Alexander* (6), where the matter was determined by demurrer, on special verdict, or on a new trial argument, or on the case so stated.

In a Revenue information in Ireland there is nothing apparently to vary the ancient practice as to pleading the general issue, and that defence in its widest common law form would seem to be still available.

2. The second point made by counsel is that no defence to the information at all is pleadable, as the only remedy against an unpaid assessment is by appeal. No doubt, for many purposes, an assessment made in the exercise of jurisdiction is conclusive: *Patchett* v. *Bancroft* (7); *Allen* v. *Sharp* (8); *Simpkin* v. *Robinson* (9). So a rate good on its face, which has not been appealed from, is binding: *Churchwardens of Birmingham* v. *Shaw* (10); *Murphy* v. *Lyons* (11). But the absence of jurisdiction may be shown: *Charleton* v. *Alway* (12); *Guardians New Ross Union* v. *Byrne* (13). Would a man wrongly assessed in respect of property

(1) 2 Jones, 124.
(2) 4 H. & N. 769; 5 H. & N. 711.
(3) 4 M. & W. 77.
(4) L. R. 6 Ex. 78.
(5) 2 H. & C. 792.
(6) L. R. 10 Ex. 20.
(7) 7 T. R. 367.
(8) 2 Exch. 352.
(9) 45 L. T. (N. S.) 221.
(10) 10 Q. B. D. 868.
(11) 9 Ir. Jur. (N. S.) 345.
(12) 11 A. & E. 993.
(13) 30 L. R. Ir. at p. 164.

he never owned or claimed to own, who never had any notice, and therefore had no opportunity to appeal, be unable to dispute his liability? But whether such a person could be made liable or not, the Crown here must prove a lawful assessment in respect of the lands on the defendant under which the money is due. To what extent the defendant may be bound will depend on the evidence of a valid assessment. The suggestion that the Crown cannot be required to prove their pleading and that defendant must admit its truth is quite inadmissible. The precedents and statutes are inconsistent with the strange view now urged. The English statutes prescribe procedure and proof on the assumption that there is something to prove and something to argue. A case may be stated under 22 & 23 Vict. c. 21, s. 10, in reference to a pending information: *Attorney-General* v. *Alexander* (1). How far the defendant may be concluded is not now before us. He is at liberty to put the Crown on proof. Nor have I to express an opinion as to what matters may be open under the common law plea of the general issue unrestricted by statute or rules. For some reason the Revenue authorities have preferred to preserve their old procedure and to keep clear of all connexion with our Judicature Rules, save in some few particulars. It is strange that pure common law procedure should still in Ireland govern Revenue defences. As counsel has cited no statute, book, or authority to show that the common law has been altered, and as I think the general issue was pleadable at common law, the motion fails, and must be refused with costs.

BOYD, J., concurred.

Solicitor for the Inland Revenue: *R. O'B. Furlong.*
Solicitor for the defendant: *Thomas J. Furlong.*

R. ST. J. C.

(1) L. R. 10 Ex. 20.

Appeal.
1903.
May 7, 11.

FOGARTY *v.* WALLIS & CO. (1).

Employer and workman—"Factory"—Dock, wharf, or quay—"Undertakers"—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory & Workshop Act*, 1895 (58 *&* 59 *Vict. c.* 37), *sect.* 23, *sub-s.* 1—1 *Edw.* 7, *c.* 22, *s.* 104.

W. & Co., a firm of carriers in Dublin, were employed by the Post Office to carry parcels for them during the Christmas season. In consequence of the heavy traffic in parcels the Post Office had taken temporarily from the dock authorities a transit shed in the Custom House Docks, Dublin, for the storage of parcels. The respondents brought the parcels from different parts of the city, including the quays, to the transit shed, from which they were forwarded to their destination. The approach to the transit shed was within the ambit of the docks, but the Post Office had not the exclusive occupation of the roadway. F., a carter of W. & Co., was at the transit shed, when he was accidentally crushed between his cart and the wall of the shed and killed. On an application by the widow of F. for compensation under the Workmen's Compensation Act, 1897 :—

Held (affirming the decision of the Recorder of Dublin), that the site of the accident was a factory within the meaning of the Workmen's Compensation Act, 1897, and the Factory and Workshop Act, 1895, and that W. & Co. were undertakers.

APPEAL from the decision of the Recorder of Dublin as arbitrator under the Workmen's Compensation Act, 1897, awarding the applicant Mary Fogarty £150 compensation for the death of her husband, Patrick Fogarty. The place where the accident occurred was in or about a transit shed in one of the Custom House Docks at the North Wall, Dublin. The shed had been let temporarily by the dock authorities to the Post Office as a depôt for the parcel traffic of the Christmas season, and was appropriated by the Post Office for that purpose. Parcels were carried to it from all quarters of the city, including the quays, deposited in the shed, and then forwarded to their destination. The respondents were carriers, and the whole carriage of this traffic both to and from the transit

(1) Before PALLES, C.B., and FITZ GIBBON and HOLMES, L.JJ.

shed was undertaken by the respondents, in whose employment Patrick Fogarty was a carter. On the day of the accident thirty horses and carts of the respondents were employed at the transit shed, and several of these made several journeys each in the day. They drew up on the quays of the dock adjacent to the basin on the roadway round the shed, which were all within the ambit of the dock premises. The respondents had not the exclusive appropriation of these, as other vehicles might pass and re-pass, but as regards the transit shed they practically appropriated the approach that day. While so employed Patrick Fogarty was crushed between a cart and the wall of the shed and killed, under circumstances from which no blame attached to anyone.

On the 28th February, 1903, the Recorder gave judgment, and held, first, that the site of the accident was a factory within the definition clause of the Workmen's Compensation Act; and, secondly, that the respondents were undertakers within the same.

Wallis & Company appealed.

W. M. Magrath (with him *Chambers, K. C.*), for the appellants:—

Wallis & Company are not liable. First, the place where the accident occurred was not a factory, because it was not a dock, wharf, or quay within the definition of "factory" in section 7 of the Workmen's Compensation Act, 1897, nor was it used as such. The workman was not engaged in loading or unloading a vessel. This place was not a warehouse; store-rooms ancillary to a retail trade are not a warehouse: *Burr* v. *Whiteley* (1). The Post Office were not storing goods for other people, but for the convenience of their own traffic.

Secondly, Wallis & Company were not undertakers within the meaning of the Act. If a workman were sent to a factory of which the employers were not the occupiers, that does not make them undertakers: *Stewart* v. *Dungaval Coal Co.* (2); *Bee v. Owens* (3); *Francis* v. *Turner* (4).

(1) 19 *Times* L. R. 117.
(2) Robertson & Glenn's Cas. 141.
(3) Robertson & Glenn's Cas. 52.
(4) [1900] 1 Q. B. 478.

Appeal. 1903.

FOGARTY v. WALLIS & Co.

T. Sullivan, for Mrs. Fogarty :—

The premises were a "factory" within the meaning of the Workmen's Compensation Act, and the appellants were occupiers thereof, and therefore "undertakers."

1. The premises were a dock, wharf, or quay, or premises within the same, and forming part thereof (Factory Act, 1901, s. 104), and were therefore a factory within the Factory Acts and Workmen's Compensation Act: *Raine* v. *Jobson* (1); *Kenny* v. *Harrison* (2).

2. The respondents are "undertakers." By section 7 of the Workmen's Compensation Act "undertakers" mean the occupiers of a "factory" within the meaning of the Factory and Workshops Acts, 1878 to 1895; and "factory" by section 7 of the Workmen's Compensation Act has the same meaning as in the Factory and Workshop Acts, and also includes any dock, wharf, quay, warehouse, machinery or plant. By sect. 104 of the Factory and Workshops Act, 1901 (1 Ed. 7, c. 22), the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, shall be deemed to be occupier of a factory. The respondents had the use of premises within a dock; being "undertakers" means that they had the use of the dock or quay: *Bartell* v. *Gray* (3); *Merrill* v. *Wilson* (4); *Kenny* v. *Harrison* (2); *Creedon* v. *Desmond* (5).

May 11.

THE LORD CHIEF BARON :—

Two questions have been argued in this case: first, was there evidence that the site of the accident was a "factory" within the meaning of the Act of 1897? secondly, if so, was there evidence that the appellants, the employers of the deceased, were "undertakers" within the meaning of the same Act?

This site, which is on one of the private roadways within the docks, was, by its physical situation, within the description of "premises within" "a dock," and also a "quay" within the meaning of the Factory Act, 1901 (1 Ed. 7, c. 22, s. 104); and this Act is, by

(1) [1901] A. C. 404.
(2) [1902] 2 K. B. 168.
(3) [1902] 1 K. B. 225.
(4) [1901] 1 Q. B. 35.
(5) 2 New Ir. Jur. 207.

sect. 38 of the Interpretation Act, to be substituted in the Act of 1897 for the former Factory Acts therein referred to. Consequently, this roadway is a "factory" within the Act of 1897. I desire, however, to state explicitly that I by no means hold that a public shed could be a "factory" within the Act. The considerations applicable to those two different subject-matters appear to me to be wholly different. The argument of Mr. Magrath was that it was not such a "dock" or "quay," because at the time of the accident it was not being used as such; but it is quite clear on the words of the Act, and on the authorities which have construed it, that, in determining whether a particular thing is or is not a factory, we have to consider the thing itself, not the mode in which it is being used. In *Raine* v. *Jobson* (1) the Earl of Halsbury, L.C., says:—"The respondents are a firm, part of whose business consists of repairing ships, and for the purpose of their business they hired the dock. *I do not care for what purpose they hired it.*" So, too, in *Kenny* v. *Harrison* (2) the Master of the Rolls says: "Where the place is, by its physical situation and other circumstances, such as to be in its nature a dock, wharf, or quay, it appears to me to be no answer to say, as the appellants do in this case, that at the particular time when the accident occurred it was being temporarily used for a purpose not strictly that of a dock, wharf, or quay. It does not alter the character of the place upon which the timber was deposited, if it was for the time being used in a way which might render it difficult to use it for the purposes which it was by its nature designed to serve, namely, those of a dock, wharf, or quay. That point seems really to be decided by what Lord Halsbury, L.C., said in the case of *Raine* v. *Jobson* (1), in which it was held that a dock did not cease to be a dock for the purposes of the Workmen's Compensation Act, 1897, because it was hired from the Dock Company for the purpose of repairing a ship. The whole basis of the argument of the appellants in the present case seems to be that, in the circumstances which existed at the time of the accident, the place in question was not being used after the manner of a dock, wharf, or quay. I do not think that signifies, if it was in its nature a dock, wharf, or quay."

(1) [1901] A. C. 404. (2) [1902] 2 K. B. 168.

Appeal. 1903. FOGARTY v. WALLIS & Co. Palles, C.B.

As to the second question, by section 7 of the Act of 1897, "undertakers," in the case of a factory, are defined to mean "the occupiers thereof within the Factory and Workshop Acts, 1878 to 1895." For these Acts the Factory Act of 1901 is, as I have already said, to be now substituted; and by the 104th section of that Act the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, shall be deemed to be the occupier of a factory.

The question, therefore, is whether there was evidence that the respondents, at the time of the accident, had the actual use or occupation of the roadway in question. It was, as I have said, a private roadway. The appellants were actually using it, and there was evidence that they were using it lawfully; but that such use was very different from the lawful use of a public highway. In my opinion the decisions, both in England and here, coerce us to hold that the use of which there was thus evidence was an actual use within the meaning of the section I have referred to.

Of the many cases upon the subject, I shall refer to but three: *Merrill* v. *Wilson* (1), which was approved of by the House of Lords in *Raine* v. *Jobson* (2); *Bartell* v. *Gray* (3); and the decision of this Court in *Creedon* v. *Desmond*, of which there is a short note in 2 New Irish Jurist, 207.

In *Merrill* v. *Wilson* (1) the respondents, the owners of a ship which was moored alongside a quay, had the use and occupation of the portion of the quay alongside of which the ship lay for the purpose of unloading the ship's cargo. The deceased was employed by them as one of a gang of labourers for the purpose of unloading cattle from the ship into lighters in the dock. As soon as the vessel was moored in her berth alongside the quay, the deceased man and others of the gang proceeded to place a gangway from the quayside to the ship, for the purpose of going on board and commencing the work of discharging the cattle, and while so engaged the deceased tripped against something on the quayside, and fell, and was so crushed between the quay and the ship that he died. It was held that the shipowners, *having the*

(1) [1901] 1 K. B. 35. (2) [1901] A. C. 404. (3) [1902] 1 K. B. 225.

actual use of a portion of the quay, were undertakers in respect of a factory within the meaning of the Act of 1897, section 7, and liable to make compensation to the dependants of the deceased. The Master of the Rolls, in giving judgment there, in reference to section 23 of the Factory Act of 1895, which in words is the same as those of the provision I have read from the Act of 1901, says:—"It must be observed that the sub-section appears to draw a distinction between 'use' and 'occupation.' Here we have the respondents' ship alongside the quay, and monopolising the use of a portion of it for the purpose of unloading and for as long a time as may be required." "Is it, or is it not, true to say that, under these circumstances, the shipowners have the 'actual use' of the quay? The Legislature has used these words, and I see no ground which entitles us to cut down their natural meaning. I think we are bound to say that 'use' means something other than 'occupation' in the legal sense; and I cannot see my way to saying that the respondents were not actually using the quay at the time when the accident happened."

Bartell v. *Gray* (1) was also a decision of the Court of Appeal. There the employers of the workman contracted to do the painting and plumbing on a ship lying in a dock, and sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work they had contracted to do. One of the workmen was injured by an accident in the course of his employment. It was held that he was entitled to compensation. The Master of the Rolls says, page 229:—"It seems to me that no one can carry on an operation on a ship floating in a dock without having the use of the dock, and that when you have persons who have taken such a contract and are engaged in carrying it out, they have the use of that area of the dock for the purpose of their work, and are undertakers. It was contended that there cannot be use or occupation within the Act unless it is exclusive, but it has been pointed out that that argument was put to this Court in *Merrill* v. *Wilson* (2) and overruled. As was shown in that case, where the Court is dealing with user, the

(1) [1902] 1 K. B. 225. (2) [1901] 1 K. B. 35.

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nature of the subject-matter of the user must be looked at, and the use or occupation of a wharf may be very different from the use or occupation of some other subject-matter. Further, the use or occupation of any given thing may well be subject to the use of the same thing by someone else, provided that the two do not conflict. That consideration cuts the ground from under the argument that the occupation of the person sought to be charged as undertaker must be exclusive."

"Use," then, within the meaning of the section, being something different from occupation, and not necessarily being exclusive, is it possible to say that there was not evidence that the very peculiar user by the appellants was not such a use? In my opinion it is not. The very question here, however, must be taken to have been decided by this Court in *Creedon* v. *Desmond* (1). That case seems to me to be much stronger than the present if we read it in connexion with *Raine* v. *Jobson* (2), for that which was held in that case to have been a factory must have been the portion of the quay on which the cart was standing; and although the injury there arose during the operation of unloading, a careful consideration of sect. 104 of the Act of 1901 will show that that fact is not material. The words "process of loading or unloading" in that section refer only to machinery or plant.

Having twice in the course of this judgment said that the appellants' user was lawful, I desire to say that I do not express any opinion as to the effect which would have been caused had the user been unlawful. The words of the section are "actual use." I do not say that the employer could rely on illegality in his user as an answer to a claim for compensation under the Act.

Upon the whole, I am of opinion that although the Post Office authorities were undertakers of the factory, which consisted of the transit shed, there is evidence that the appellants here had, as the learned Recorder has found, such an actual use of the quays and dock roadways round the transit shed (which were another factory) as constituted them undertakers in respect of such other factory within the meaning of the Act of 1897.

The decision must be affirmed with costs.

(1) 2 New Ir. Jur. 207. (2) [1901] A. C. 404.

FITZ GIBBON, L. J. :—

It is an interesting illustration of the artificiality of the legislation that the two questions to be decided, viz :—

(1) Was the work in which Fogarty was engaged when he met his death an employment to which the Workmen's Compensation Act, 1897, applied ?

(2) Were Wallis & Sons, as his employers, within the Act ?

technically take the following form :—

(1) Was the site of the accident a "factory" ?

(2) Were Wallis & Sons "undertakers" ?

In my opinion these two questions must be answered in the affirmative, both upon the language of the Acts, and upon previous decisions in England and here.

(1) Was the site of the accident a "factory" ?

The Factory and Workshops Act, 1895, sect. 23 (1) (omitting inapplicable alternatives) contains these words :—

> "The provisions of the Factory Acts with respect to accidents shall have effect as if every dock, wharf, quay, were included in the word factory."

The site of the accident here was within the Custom House Docks, which were at one time the only docks in Dublin, and are still partly used as docks. Though the work at which Fogarty was engaged had nothing to do with their use as docks, the definition of "factory," which brings in every dock, wharf, and quay, makes no reference to the mode of user. The Custom House Docks did not cease to be docks because the Post Office hired a transit shed to meet the Christmas pressure on the parcel post. The site of the accident was a wharf or quay originally constructed for dock purposes, but we cannot hold that it ceased to be a wharf or quay because it was being used for the cartage of the Post Office traffic to and from the transit shed. The site of the accident, therefore, in my opinion, was a "factory," as being within a dock, or being a wharf or quay. If there was any evidence to sustain the Recorder's decision to that effect, we have no jurisdiction to disturb it; but in my opinion he could not have found otherwise than as he did.

Appeal. 1903. FOGARTY v. WALLIS & Co. Fitz Gibbon, L.J.

(2) Were Wallis & Co. "undertakers"?

The Act of 1897 defines "undertaker," in the case of a factory, as meaning "the occupier thereof" within the meaning of the Factory and Workshops Acts of 1878 to 1895. The Act of 1895, sect. 23 (1), enacts that

> "the person having the actual use of a dock, wharf, or quay, or of any premises within the same, or forming part thereof, shall be deemed to be the occupier of a factory."

Wallis & Sons had the actual use as a roadway of the wharf or quay, which was within the Custom House Docks, for the purpose of performing their contract to cart the Post Office traffic for reward. That use was lawful, and Fogarty was engaged, as a carter in the employment of Wallis & Sons, in performing their contract when he met his death. They were, therefore, in my opinion "undertakers" within the Act. Therefore the second question also must be answered in the affirmative, both because there was evidence to sustain the Recorder's finding, and also because that finding followed the words of the Acts.

As to previous decisions, I cannot see any difference between occupation of its site by a barge floating on the water of a dock and by a cart resting upon a wharf or quay; and I cannot distinguish between the use had here by Wallis & Sons of the wharf or quay for their carts and the use had in *Hanlon's Case* (1) by the Milling Company of the Custom House Docks for their barge, or from the use had by the defendants of the quay in *Creedon's Case* (2) or in *Merrill's Case* (3), or from the use which Gray & Company had of the site of the ship which they were painting in dock in *Bartell's Case* (4).

Though I agree with the contention of the defendants that, to make employers liable for an accident in a factory, the factory must be *their* factory, this serpentine legislation makes it *their* factory if they have the actual use of it, or of any part of it, and the use here proved is "actual use" within the meaning of the Acts.

I therefore agree that this appeal must be dismissed with costs.

(1) [1903] 2 I. R. 164.
(2) 2 New Ir. Jur. 207.
(3) [1901] 1 K. B. 35.
(4) [1902] 1 K. B. 225.

HOLMES, L. J.:—

I know no Act of Parliament in the construction of which I more willingly surrender my own judgment to the guidance of authority than the Workmen's Compensation Act, 1897. The intricate and enigmatic mode adopted in its drafting has rendered the intention of the Legislature so obscure as to make either a reasonable or harmonious interpretation hopeless; and feeling that whatever meaning I give its provisions, the result, in the words of the Recorder of Dublin, will be to award compensation to one applicant, whilst another under almost identical circumstances is sent empty away, I am the more determined to avoid the additional difficulties that would result from conflicting judicial decisions. In this state of mind it gives me great satisfaction to learn that the questions raised in the present appeal have been already settled by this Court or by a tribunal of greater or equal authority.

The first point is, whether the deceased man when he met with the accident that caused his death was employed on, in, or about a factory. In *Hanlon* v. *North City Milling Company* (1) this Court held in effect that every dock was a factory; and it must, I think, follow therefrom that every wharf or quay is also a factory. Was, then, the applicant's husband employed on, in, or about a dock, wharf, or quay?

Now it appears from the Recorder's report that there is in one of the Custom House Docks a transit shed erected I presume, as its name implies, for the convenience of traffic from and to ships using the dock. The scene of the accident was the roadway or approach to this shed within the enclosed ambit of the dock premises. Whether this be called part of the dock, or a wharf, or quay is immaterial. In any case, the man, so far as locality is concerned, was employed on, in, or about a dock, wharf, or quay. But he was not employed in connexion with any purpose for which the dock, wharf, or quay had been constructed—that is to say, the loading, unloading, or storing the freight of vessels using the same. It had been temporarily let to the Postmaster-General as a depôt for the postal parcel traffic at Christmas. It was, in fact,

(1) [1903] 2 I. R. 163.

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an adjunct to the Post Office, differing in no respect from other buildings hired in different parts of the city for the same purpose save in the accidental circumstance that it was situated within the dock enclosure. I confess that this would have presented a difficulty to my mind were it not for the decision in *Kenny* v. *Harrison* (1). In that case a Railway Company, the owners of docks, leased a piece of ground within their ambit to be used for stacking timber, and it was held that the lessees were obliged to pay compensation for injuries received by one of their workmen in the course of his employment thereon, although the timber had been carried by rail and was not intended for shipment, nor was there any connexion except that of locality between the timber yard and the docks. Following this decision of the English Court of Appeal, I hold that the deceased man, although doing no work connected with the docks as docks, was, nevertheless, employed on a dock, wharf, or quay within the provisions of the Workmen's Compensation Act.

The remaining point is, whether his employers were undertakers within the meaning of the statute. This depends on whether they had the actual use or occupation of the place where the accident occurred. They were the contractors for the Post Office to carry in their wagons parcels to and from the shed, and as such were entitled to use the approach to it, and their vehicles were actually using and occupying such approach at the time of the accident. Assuming, as I think I am bound to do, that the delivery of parcels at the shed and the taking of parcels therefrom by means of the wagons was a process corresponding in its legal consequences to the loading or unloading of a cargo of a vessel by wagons, I am of opinion that the matter now under consideration was decided by this Court in *Creedon* v. *Desmond* (2).

It is unnecessary for me to refer to the argument founded on the admission that if a carter of the undertakers had been delivering parcels at one of the other Post Office depôts in the city, and while so doing had met with an accident precisely similar to what befel the deceased, compensation would not have been payable. This is one of the many anomalies of the statute which I cannot

(1) [1902] 2 K. B. 168. (2) 2 New Ir. Jur. 207.

believe were intended by the Legislature; but not being able to gather from the cryptic character of its provisions what was intended, I am content to adhere as closely as possible to the principles that seem to underlie previous decisions.

Solicitor for the appellants: *Gerald Byrne.*
Solicitor for Mrs. Fogarty: *James Brady.*

R. D. M.

THE KING (COLLINS) *v.* THE CHAIRMAN AND JUSTICES OF CO. DONEGAL (1).

Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *s.* 2—*Application by spirit grocer for publican's license.*

By section 2 of the Licensing (Ireland) Act, 1902, after the passing of the Act "no license shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except (1) for premises which are now licensed, or which were licensed at any time since the 1st day of January, 1902":—

Held, that the words "license" and "licensed" must be read distributively, and that the exception in question did not entitle the holder of a spirit grocer's license to apply for a publican's license.

CERTIORARI AND MANDAMUS.

At the annual Licensing Quarter Sessions, held on the 21st October, 1902, at Letterkenny, county Donegal, the prosecutor had applied for a publican's license in respect of his house and premises, he being at the time of such application a licensed spirit grocer carrying on business as such in the said premises. Objection was made on behalf of the District Inspector of Constabulary to the granting of such license on the ground that it was not competent to the Court to entertain the application, having regard to the statute 2 Edw. 7, c. 18. The Court of Quarter Sessions adopted this view, and refused the application.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

K. B. Div. 1902.

THE KING (COLLINS) *v.* JUSTICES OF DONEGAL.

The prosecutor having obtained a conditional order for writs of *certiorari* and mandamus, the present application was on behalf of the District Inspector to discharge such conditional order.

Morphy (with him *The Solicitor-General, Campbell, K.C.*), for District Inspector J. A. Marks:—

This must be considered as an application for a new license: *Reg.* (*Burke*) v. *Recorder of Dublin* (1). The case comes within section 2 of the Licensing (Ireland) Act, 1902 (2 Edw. 7, c. 18), and is not saved by exception (1) in the section; that exception was intended merely to preserve the existing rights of holders of licenses, and to enable the Excise authorities to continue to issue licenses to them. The words "license" and "licensed" in the section must be read distributively: *Reg.* v. *King* (2).

Gaussen and *Henry, K.C.*, for the prosecutor:—

Where there is a license attached to the premises, whether spirit grocer's or publican's, the case comes within exception 1 of section 2 of the Act of 1902. The object of that exception cannot be merely to save existing licenses since that is effected by section 7. The distributive construction suggested renders section 2 meaningless. The Legislature may well have thought that it would be for the advantage of the public that the existing spirit grocer's licenses should be turned into ordinary publican's licenses; in such case the police would have a right of search, and the facilities for women obtaining drink would be diminished. [They referred to the definitions of "license" in section 8 of 2 Edw. 7, c. 18, and in section 37 of 37 & 38 Vict. c. 69.]

The Solicitor-General (*Campbell, K.C.*), in reply:—

The construction we contend for is equally open on the language with the construction contended for on the other side; we must therefore look at the intention of the Act. If every spirit grocer in Ireland was entitled to apply for a publican's license, the object of the Act would be defeated.

Cur. adv. vult.

(1) 2 L. R. Ir. 385 (2) 20 Q. B. D. 430.

LORD O'BRIEN, L. C. J. :—

This case raises an important question under the Licensing (Ireland) Act, 1902. A man named Collins, who had a spirit grocer's license, applied in October last at the general Licensing Sessions for county Donegal for a publican's license. The Chairman, Mr. Pakenham Law, ruled that he was precluded by the Act from granting the application. We are all of opinion, that he was right in so doing. No doubt the definition of the word "license" is of a very general character, but I think the question may be disposed of by having regard to the scope and object of the Act. What was the scope and object of the Act? We are to collect this from the language of the Act, and I think section 2 of the Act makes it plain. The language of the section is, that from and after the passing of this Act no license shall be granted for the sale of intoxicating liquors off or on the premises. This in so many words forbade the issue of new licenses. That is to say, the scope and object of the Act was to restrict, to suspend for the time limited by the Act, the sale of intoxicating liquors. Now the public-house was the great source of supply of drink to the public, as its very name implies. A spirit grocer's business might be fraught with danger to a certain limited class, say to women who were addicted to drink and who might avail themselves of a more or less secret way of getting drink at a spirit grocer's; but the great emporium of intoxicating liquors and the great means of supply to the public was the public-house. Having regard then to the scope and object of the Act of Parliament, I do not think that the first sub-section of section 2 has the very general effect ascribed to it by applicant's counsel. There are many thousand spirit grocers in this country; and if the applicant's contention be well founded, it would be possible to convert all these into publicans, and thereby give an impetus to and develop the very evil it was intended to repress. This consideration reasonably leads to the conclusion that the word "licensed" is to be read distributively—that the rule of construction, *reddendo singula singulis*, is to be applied, that is to say, in each application for a license regard must be had to the license already attached to the premises, to the character of the license the applicant has had before he applied; and that being so, taking the character of the license already

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attached to the premises, you must not give to the applicant a license more comprehensive in character and quality than that which he previously had. The *status quo* was to be preserved, not extended. This is enough to dispose of this case, but I think the view I have taken derives confirmation from the 3rd, 4th, and 6th sections of the Act. I think the 3rd section contemplates a license identical in character with that which attached to premises when the lease under which they were held expired. I think the 4th section contemplated that the substituted license was to be identical in character with that for which it was substituted; and I think that the exception or enabling power in the 6th section extended only to the licensing of new premises in a manner identical with the way in which the original premises, which the new premises were intended to improve, were licensed. On all these grounds, I am of opinion that the ruling of the learned County Court Judge was right.

GIBSON, J.:—

The statute of 1902 withdraws from the licensing authority until the end of the year 1907 any power of issuing new licenses save in certain excepted cases. The exception here applicable is contained in section 2, sub-section 1. The point for decision is, whether the provision is to receive a distributive construction limiting the right to apply for a license of the same kind under which the premises are licensed, as in *Reg.* v. *King* (1); or whether any one license vests in the holder a right to apply for another kind of license. The section is phrased in such a way as to make either interpretation possible.

The right which is saved is attached not to the license-holder, but to the premises. The intention was probably not so much to protect the property of existing owners as to safeguard the interests of a locality, which, by the lapse of a license, might have been deprived of the means of satisfying its legitimate requirements.

A spirit grocer's license was essentially different from a publican's, a leading objection to which latter was the number of

(1) 20 Q. B. D. 430.

previously licensed houses in the neighbourhood. Was it intended by section 2 to put spirit grocers' premises and publicans' premises in the same position on an application for a new license, or was the nature of the application determined by the nature of the license attached to the qualifying premises? It would seem reasonable that on an application for a new license premises previously holding that kind of license should have a sort of goodwill or preference, and should not be exposed to competition on the part of persons who, *qua* that species of license, were new beginners.

Collins' counsel contend that the language of section 2 favours their view; that the definition clause shows that all licenses were clothed with identical rights of application; and that Parliament, from the dangerous character of a spirit grocer's trade, may have thought it in the interests of temperance to give all spirit grocers and other license-holders the opportunity of acquiring full licenses.

I am unable to adopt this view. "License" and "licensed" in section 2 refer to the same species and quality of license. The qualifying premises determine the nature of the license which can be granted. In sections 3 and 4 it is plain that the new license is to be of the same nature as the extinguished license. If an "on" license can be given to replace an "off" license, the statute becomes a kind of Spirit Grocer's Relief Act. The only benefit that premises with an "on" license would get under the Act would be if the license drops. Spirit grocers and other license-holders would try to change at once. Owners of fully licensed premises therefore in applying for new licenses would be not only exposed to competition with (amongst others) spirit grocers, but such grocers as were first in the field might get licenses which would be counted in the number of previously licensed houses when the ex-publican's application came up for consideration, so that the spirit grocer would be better off than the latter.

It was suggested that on Mr. Law's view there would be nothing for the Act to operate on. The section, however, applies, and is intended to apply, to premises ceasing to be licensed during the period up to the end of 1907.

The definition was relied on. It is merely a compendious description of the classes of license covered by the Act, and was

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not intended to fuse them together and give them identical rights.

I admit that the construction of the statute is not free from doubt. The difficulty is caused by the compression and conciseness of the drafting. But the previous state of the law, the essential difference between the licenses, sections 3 and 4, the mischief to be remedied, and the policy of the Act, make the distributive construction the probable one, and I adopt it. The object was to preserve the *status quo*, preventing, on the one hand, any increase of drinking facilities, and, on the other, any undue diminution of such existing facilities. It would be a strange way of carrying out such an object to give an opportunity to the licensing authority (which Parliament obviously distrusted) of adding a multitude of spirit grocers or other license-holders (for the statute is not restricted to two classes of licenses) to the ample existing publican roll.

MADDEN, J.:—

I concur. It was fortunate for the promoters of the legislation now under consideration that the interests of the general public and of the holders of existing publicans' licenses happened in this instance to point in the same direction. They were both interested in having some check placed on the reckless multiplication of licensed houses in Ireland which was taking place owing to the action of certain licensing authorities; a state of things the existence of which is matter of common knowledge, and to which we cannot shut our eyes in construing this Act of Parliament; for it is the mischief with which it deals. This mischief is remedied to some extent by stereotyping the existing state of things for a period of five years, due regard being had to existing interests, and to the legitimate requirements of the public. Accordingly, words are inserted in the 2nd section of the Act which if they stood alone would prevent the granting of a new license under any circumstances during the statutory period. Upon these general words an exception is grafted by sub-sect. 1, the policy of which is obvious, because since the decision in *Clitheroe's Case* (1), a *quasi*

(1) I. R. 11 C. L. 412.

proprietary interest has been recognised in the license attached to premises. It was evidently considered reasonable that the owner of premises which were licensed at the time of the passing of the Act, or at any time since the 1st January, 1902, should be recognised as having a claim for consideration, if for any reason he should during the statutory period find himself excluded from the provisions of the law with regard to renewal and transfer, and should be compelled to appear before the licensing authority as an applicant for a new license. An applicant in this position was always fairly considered by the licensing authorities to have a special claim for consideration, and it appears to me that the effect of the subsection before us is simply to recognise such a claim. But it is a claim for the preservation, not alteration, of his former position. No doubt the definition of "license" is sufficiently extensive to include a publican's license, a beer license, and a spirit grocer's license, and that is obviously right, because the granting of each class of license is prohibited during the statutory period, unless the applicant can bring himself within one of the exceptions. But although the Act deals with all these classes of license, each individual applicant is possessed of an individual and separate kind of license, and it is his interest in this, and not in any other kind of license, that is safeguarded. In the absence of express words I could not come to the conclusion that a section obviously intended to preserve existing interests had the effect of altering them. If we were to disregard the distributive construction of the Act, the absurd result would follow that the holder of a beer-house license would, under this prohibitive legislation, find himself in a position to apply for a publican's license by virtue of a clause obviously intended to preserve existing interests, his particular interest being that of the holder of a license of a different kind. I cannot regard as without foundation the apprehensions that have been expressed that the holders of spirit grocers' licenses might in certain localities be transformed into publicans' if it were open to the licensing authorities to do so under the Act. I have no means of ascertaining the number of spirit grocers in Ireland, but it is very large. It has been stated that there are 2000 in the city of Dublin alone. The licensing authorities whose action the Act is intended to affect would be

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more or less than human if they did not resist an attempt on the part of the Legislature to limit and control what they, no doubt, regard as a beneficent mode of providing for the requirements of the community. Thus, Parliament having passed an Act for the purpose of prohibiting the granting of publican's licenses for five years, would awake on the expiration of that period to find the number of such licenses increased by many thousands. In my opinion the distributive construction of the Act is the natural one, and by adopting it full effect is given to all the provisions of the Act.

Solicitor for the prosecutor : *William O'Doherty.*
Solicitor for District Inspector J. A. Marks : *Sir Patrick Coll.*

J. G. T.

M'DOWELL, APPLICANT; CORPORATION OF DUBLIN, RESPONDENTS (1).

Appeal.
1903.
June 19.
July 4.

Malicious injury to property—Compensation—Breaking a plate glass window for the purpose of committing larceny—Subsequent conviction for the felony—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97)—*Local Government Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 5.

For the purpose of committing a larceny, for which he was subsequently convicted, a thief broke a window pane, the property of the owner of the stolen goods:—

Held, that the breaking of the window pane was a crime punishable on indictment, under the Malicious Damage Act, 1861, and a criminal injury, for which compensation to the owner might be awarded under the Grand Jury Act, 1836, as extended by the Local Government (Ireland) Act, 1898, sect. 5, sub-sect. 1.

Wilde v. *Armagh County Council* (2 New Ir. Jur. 169) disapproved of. *In re Borrowes* ([1900] 2 I. R. 593) followed.

The statutory meaning of the word "malice" considered.

CASE STATED by Barton, J., before whom the case came on appeal from the Recorder of Dublin on the 20th April, 1903.

The application was one for compensation for criminal injuries to property under 6 & 7 Wm. 4, c. 116, s. 135, as extended by section 5 of the Local Government Act, 1898. The applicant's case was that on Saturday, the 27th December, 1902, Samuel Goodbody broke a pane of plate glass in a window of his premises 3, Upper Sackville-street, in the city of Dublin, and that he thereby sustained a loss of £50. The plate glass window was broken in the course, and for the purpose, of committing a larceny of jewellery which was in the window, for which larceny Goodbody was subsequently convicted. The Recorder gave a decree for £6 6*s.* and £2 11*s.* costs.

It was submitted on behalf of the Corporation that under the

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, WALKER, and HOLMES, L. JJ.

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authority of the case of *Wilde* v. *Armagh County Council* (1) the application should be dismissed, as the dominant motive of the transaction was larceny and not malicious damage. The applicant relied on *Reis* v. *Corporation of Dublin* (2); and *In re Borrowes* (3); and also that as the glass was broken in the commission of an unlawful act, he was entitled to a decree.

It was contended by the Corporation that the decision in *Reis* v. *Corporation of Dublin* (2) in applying the decision in *Re Borrowes* (3) to the facts of *Reis' Case* (2), and in holding that the same was inconsistent with the judgment of Gibson, J., in *Wilde* v. *The Armagh County Council* (1), was wrong, and it was further contended that the judgment in *Wilde* v. *The Armagh County Council* (1) was not inconsistent with that in *Re Borrowes* (3), the facts being altogether different, and that the manner in which the case was stated in *Re Borrowes* (3) made it practically impossible for the Court of Appeal to do otherwise than confirm the decree for compensation. Since the hearing of the case, Barton, J., stated that his attention had been called to the case of *R.* v. *Thomas Ross* (4). Having in view the fact that the judgment of Gibson, J., in *Wilde* v. *Armagh County Council* (1) and that of Johnson, J., in *Reis* v. *Corporation of Dublin* (2), were conflicting judgments of equal authority, Barton, J., proposed to state a case for the opinion of the Court of Appeal, and both parties agreed to this course.

The question of law for the decision of the Court of Appeal was, whether on the facts stated in the case the application for compensation was sustainable in law.

Blood, K.C., and *Thornhill*, for John M'Dowell, the applicant:—

The fact that Goodbody has been convicted of a felony cannot alter our rights under section 5 of the Local Government Act. It is necessary to go back to see what our rights were at the date the acts were committed. Goodbody could then have been indicted

(1) 2 New Ir. Jur. 169.
(2) 3 New Ir. Jur. 184.
(3) [1900] 2 I. R. 593.
(4) Russell & Ryan's Crown Cases Reserved, 10.

under the Malicious Damage Act of 1861, and what has taken place since cannot alter our rights. By section 58 of the Malicious Damage Act, 1861, malice against the owner of the property is unnecessary; and by section 59 the provisions of the Act apply to persons in possession of the property injured. Once property is destroyed or injured, it is not necessary to prove malice against the owner: *Reg.* v. *Martin* (1). This question was decided in our favour by Johnson, J., in *Reis* v. *Corporation of Dublin* (2). They also referred to *Borrowes* v. *Kildare County Council* (3).

Serjeant Dodd and *D. Kehoe*, for the Corporation of Dublin:—

It is necessary to show a malicious intention on the part of the wrong-doer: *Drake* v. *Footitt* (4). This act was not a crime punishable under the Malicious Damage Act 1861; the wrong-doer has been convicted of a felony. Breaking the head of a fish pond was held not to be a felony if the only object was to steal the fish: *R.* v. *Ross* (5). The dominant motive of the act was larceny, and not malicious damage: *Wilde* v. *Armagh County Council* (6).

LORD ASHBOURNE, C.:—

July 4.

This case has been discussed before us as one of much practical importance, and it must guide and influence the administration of the law in reference to claims relating to many criminal or malicious injuries in Ireland.

Under section 135 of the Irish Grand Jury Act of 1836 provision is made for obtaining, on certain requirements being satisfied, compensation for malicious injuries to some classes of property. The Local Government Act, 1898 (section 5), transfers this jurisdiction to the County Court, and at the same time enlarges the description of property in respect of which compensation might be awarded, but the extension is subject to the condition that the injurious or criminal act is a crime punishable under the Malicious Damage Act, 1861.

(1) 8 Q. B. D. 54.
(2) 3 New Ir. Jur. 184.
(3) [1900] 2 I. R. 593.
(4) 7 Q. B. D. 201.
(5) Russell & Ryan's Crown Cases Reserved, 10.
(6) 2 New Ir. Jur. 169.

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It may be noted that section 135 of the Grand Jury Act at its outset uses the words "maliciously or wantonly," and then all through the word "maliciously" only, while the Malicious Damage Act, 1861, uses the term "unlawfully and maliciously."

The facts of the present case are few and simple. A man called Goodbody, for the purpose of committing a larceny of jewellery in the claimant's window, broke a valuable pane of glass. The man was indicted in respect of the larceny, and then the claimant demanded that the Corporation should pay him the cost of the pane, which he alleged was broken maliciously, and was within the section I have mentioned. The Recorder accepted this view, and awarded compensation and costs to be paid by the Corporation. The Corporation appealed from this decision, and when the circumstances and authorities were opened before Barton, J., he said he would state a case to be discussed. He was influenced to take this course by decisions of Judges of the High Court, which he believed were in conflict, Johnson, J., in *Reis' Case* (1) having held that the claimant was entitled to recover if the criminal injury was inflicted when committing an unlawful act; whilst it was alleged that Gibson, J., had held in the case of *Wilde* v. *Armagh County Council* (2) that it was necessary to have regard to the dominant motive.

The argument of the Corporation has practically come to this: that Goodbody did not commit a malicious injury in breaking the glass, because his object was larceny, and he only broke the glass with the secondary motive of getting at the jewellery. Thus the question is at once raised—what is the meaning of the word "malicious" in the 135th section of the Grand Jury Act, as expanded by section 5 of the Act of 1898? Does it mean personal malice or ill-will, or does it mean an unlawful act, done intentionally?

Bayley, J., defines "malice" by saying, "In its legal sense it means a wrongful act done intentionally without just cause or excuse." It may lead to great uncertainty and confusion if when damage has been unlawfully and intentionally caused, Courts have to speculate whether a thief had personal ill-will to the owner, or

(1) 3 New Ir. Jur. 184. (2) 2 New Ir. Jur. 169.

only desired to steal his property, using no more force than was necessary. Once the balance of motives in a criminal's mind has to be adjusted before a judicial decision can be reached it is obvious that the most honest juries may easily be misled. Under ordinary circumstances the definition of Bayley, J., must apply, and a man should be assumed to act maliciously who does an unlawful act calculated to injure another. Is there anything to show or indicate that it has a different meaning in section 135, and that it requires the element of personal spite or ill-will? There might be many bad motives, apart from personal dislike, which might induce an evil-doer intentionally or unlawfully to injure another man's property. When the injured man looked for compensation it would be no consolation to him to be told—you shall get nothing because the malefactor had tears in his eyes when it became necessary to break your glass to get at your jewellery.

The decision of Bayley, J., on the Black Act has been referred to. That decision is explained by the words of that Act, and the harsh code then to be administered, but there is nothing in the code now before us to justify our treating it as analogous. The matter is fully discussed in 2 East, Pleas of the Crown, 1062, and it is obvious that there is great difficulty in imputing to any statute using the words "maliciously" that it requires the presence of personal ill-will as well as unlawful intention.

It is manifest that if the case rested alone upon the Act of 1861, there would be no room for question, for Goodbody unlawfully and maliciously broke a pane value more than £5. There is no ground for suggesting that personal spite or ill-will is, under the Act, necessary. Is the question affected by the fact that the Act of 1861 is linked in sect. 5 of the Act of 1898 to sect. 135 of the Grand Jury Act? In my opinion, the act was malicious within the meaning of section 135, and on the facts stated the application for compensation is sustainable at law, and the question in the case stated should be so answered.

FITZ GIBBON, L.J.:—

Two questions are raised by this case—First, whether the breaking of the window for which compensation is claimed was a crime punishable on indictment under the Malicious Damage

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Act, 1861? and, secondly, was it a criminal injury for which compensation would be payable under the Grand Jury Act, 1836, if the property injured had come within that Act?

The answer to the first question goes but one step towards the right to compensation. The Local Government Act, 1898, sect. 5 (i.) extends to all descriptions of property the right which was previously restricted to the particular descriptions of property specified in the Grand Jury Act, 1836, sect. 135; but this extension is subject to the proviso that the injurious act is a crime punishable under the Act of 1861. The case must still be one which, if the injury were done to property specified in the Act of 1836, would give the right to compensation.

Barton, J., finds that, in this case, the window was broken in the course and for the purpose of stealing certain valuables which were inside it. The breaking was therefore a wilful act, done with the felonious purpose of stealing. If the offender was indicted for the misdemeanour of maliciously breaking the window, being above the value of £5, and if it had been proved that he had done the act with the felonious intent of stealing, he would not be entitled to an acquittal upon the charge of misdemeanour. The case would then come within the Act 14 & 15 Vict. c. 100, s. 12, and although the Court might discharge the jury, and direct the offender to be indicted for the felony, he might be convicted and punished for the misdemeanour under the Malicious Damage Act, 1861, if the Court allowed the trial to proceed. Accordingly, I should answer the first question in the affirmative.

The second question remains, and it is difficult and important. I read the case as finding that the window was wilfully broken with the intent to rob. If the crime had been committed by night, the breaking would have been an essential element of the crime of burglary. Neither in an indictment for robbery, nor for burglary, nor for house-breaking with intent to rob, would it be necessary or proper to allege that the felonious act was "malicious." Some felonies are malicious, but others are not. The question, therefore, is whether an act of wilful damage to property is taken out of the Grand Jury Act by the fact that it is felonious. Such a principle would be difficult in application. Extreme cases may be put in each direction. If a man murdered

another by shooting him through a window, could the owner of the broken window get it mended at the cost of the county? There malice aforethought would be essential to the crime. Could compensation be refused for a £50 window wilfully broken to steal a penny roll or a bottle of beer, but granted if the same damage was done from personal spite, or in a spirit of wilful mischief? In my opinion the answer must depend upon the construction and scope of the Act under which the compensation is claimed, and its application to the facts of the particular case.

The Acts awarding compensation are of two classes, and the distinction between them is clearly stated in East's Pleas of the Crown, to which Walker, L.J., has referred us.

The first class defines and punishes certain offences the repression and punishment of which is the primary object of the legislation, which incidentally gives compensation to persons injured by those offences. Under those Acts if the defined offence is not strictly proved the compensation cannot be awarded.

"The Black Act"—the English equivalent of our "Whiteboy Acts"—is an instance of this class. The decisions upon it illustrate the strictness, if not subtlety, of interpretation in which Judges have indulged where the proof of a capital felony is at issue; but these decisions necessarily governed the right to compensation also, because the action lay against the Hundred only where the injury was caused by an offence within the Act. The judgment of Bayley, J., in 3 B. & C. 250, is a demonstration on authority that personal ill-will against the owner of the property injured must be proved, either to constitute the offence or to create the right to compensation under the Black Act. This rule, though laid down upon an Act *in pari materiâ*, is altogether too narrow for our Grand Jury Act. For example, in *R.* v. *Austen* (1) a conviction was quashed, from which it followed that compensation could not be recovered, for the wilful destruction of sheep, because it was proved that the object of the prisoner's malice was a herd—a son of the owner of the sheep, and not the owner herself. This case could not possibly be used as an authority that compensation for

(1) R. & R. 490.

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the malicious killing of the sheep—an injury specifically mentioned in our Grand Jury Act, could not be recovered under that Act.

The second class of statutes are those of which the primary object is to provide compensation for specified injuries. There the language should be construed in its natural meaning, and as applicable to every case which fairly comes within the terms used. Some of these Acts are special—the Grand Jury Act is general. *Murphy* v. *Cork* [*County Council* (1) is a decision upon a special Act where compensation to a police officer is conferred only where he has been injured "on account of his exertions as a peace officer to bring disturbers of the public peace to justice." There compensation cannot be granted unless this special motive or special kind of malice is proved. But in the Grand Jury Act compensation is awarded in the first instance for injuries caused by wanton or malicious acts, and then by acts described only by the word malicious. It seems to me that breaking a window wilfully and intentionally is an act maliciously done, because it is an act of intentional injury and mischief, and as it is not necessary to fulfil any other condition in order to bring the damage or injury within the provision for compensation, in my opinion the claim should be allowed.

WALKER, L.J.:—

This case is an important one, as our decision will definitely determine the jurisdiction in proceedings for compensation for what are generally called "malicious injuries" or "criminal injuries" under the combined operation of the 135th section of the Grand Jury Act of 1836 and 5th section of the Local Government Act, 1898.

The 135th section enacts that "in all cases of maliciously or wantonly setting fire to, burning, or destroying any house, outhouse, or other building, or any haggard, corn, hay, straw, or turf, or of maliciously setting fire to, burning, or sinking any boat or barge laden with corn or other provisions, or of maliciously killing, maiming, houghing, or injuring any horse, mule, ass, or swine, or any horned cattle or sheep, or of maliciously damaging,

(1) *Ante*, p. 445.

injuring, or destroying any bank, gate, lock, weir, sluice, bridge, dam, or other work belonging to any person, public canal, or navigation, any person or persons injured by any such offence and intending to apply for compensation for any loss or damage sustained thereby" shall take certain steps to bring the application before the Grand Jury, and the Grand Jury may either disallow the application or make a presentment for the damage.

The 5th section of the Local Government Act transfers to the County Court the business of Presentment Sessions and Grand Juries in relation to compensation for what it terms "criminal injuries," that is to say compensation under the enactments as defined—6 & 7 Wm. 4, c. 116, sect. 106, and sects. 135–140, and the Malicious Injuries Acts of 1848 and 1853, and sect. 515 of the Merchant Shipping Act of 1894; and it then proceeds:—"And of those enactments sect. 135, and the following sections of the Grand Jury Act, 1836, so far as unrepealed, shall extend to the case of maliciously setting fire to, destroying, or injuring property of any description, whether real or personal, in like manner as they apply to the setting fire to, injuring, or destroying the particular descriptions of property specified in the first-mentioned section, provided that this Act shall not extend the application of the said sections to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861." The effect is to read into the 135th section, but subject to the proviso, the words "property of any description whether real or personal."

I think the real question in result is, what is the meaning of the word "maliciously" in those sections. That word is in our law capable of two meanings:—(1) Any act which is intentional, illegal, and wrongful, though there is no actual ill-will or spite existing against the person who owns the property injured, and the act is not attributable to any such ill-will. (2) An act done on account of ill-will and spite against the owner of the property, and for that reason to injure him through the injury to his property; and accordingly in the present case it was argued that Goodbody had no ill-feeling against the owner of the jewellery; his dominant motive was to steal the property inside the

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window, and though he intentionally broke the glass to accomplish his object, the dominant motive colours the whole act, and that portion of it which consists in the breaking of the glass window was not a malicious act within the section; and it was even contended that this portion of it was not, as a separate subject, within the Malicious Damage Act of 1861.

Now, I think it is quite settled that a man will in an ordinary case act "maliciously" whenever he does an unlawful act intentionally calculated to injure another. In *Reg.* v. *Martin* (1) the prisoner, in order to cause terror in the minds of persons leaving a theatre, put out the gaslights on a staircase which certain spectators had to descend, and placed an iron bar across a doorway through which spectators had to pass. He was indicted for unlawfully and maliciously wounding certain persons who were injured; and Lord Coleridge says:—"The prisoner must be taken to have intended the natural consequences of that which he did. He acted unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured." And Stephen, J., adopts the *dictum* of Lord Blackburn, "that a man acts maliciously when he wilfully, and without lawful excuse, does that which he knows will injure another." There are numerous other cases establishing that such is the meaning of the word "maliciously" as a general legal proposition, but the question remains, what is its meaning in the 135th section? On this point cases under what was known as the Black Act, 9 Geo. 1, c. 22, were alleged to rule the point against the right to compensation. That statute enacts "that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation for ornament, shelter, or profit," he should, if convicted, suffer the penalty of death, and an action against the Hundred for compensation was given to the person injured. In *Curtis* v. *The Hundred of Godley* (2) it was held, following other decisions, that this statute only applied when the act was done from malice against the

(1) 8 Q. B. D. 54. (2) 3 B. & C. 248.

owner of the property damaged. I have myself no doubt that this strict construction of the statute was adopted because the penalty was death, and *in favorem vitæ*.

But there are other statutes, *e.g.* 6 Geo. 3, c. 36, and c. 48, the object of which was to give compensation to an injured person under words "wilfully and maliciously" in which a different construction was adopted. The subject is discussed at length in 2 East, Pleas of the Crown, p. 1062, where the author, after commenting on the 6 Geo. 3, c. 36, and c. 48, and pointing out some differences of language from that in the Black Act, proceeds: "But the most important distinction of all is, I apprehend, the view and intent of the Black Act contrasted with the other statutes. Supposing that the words 'wilfully and maliciously' which occur in the preamble of the statute 6 Geo. 3, c. 36, of which the first only is used in the enacting part of the statute 6 Geo. 3, c. 48, are a descriptive part of the offence under those statutes, yet the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shows that the word maliciously is only to be taken in its most general signification as denoting an unlawful and bad act, an act done *malo animo* from an unjust desire of gain or a careless indifference of mischief. Whereas, in order to bring an offender within the penalty of death under the Black Act, the malice must be personal against the owner of the property."

It is material therefore to consider the scope and object of the Grand Jury Act as regards compensation for injured property. Up to 1833 the right to compensation for malicious injuries to the limited extent it existed was conferred by Acts which are part of the criminal law, *e.g.* 15 & 16 Geo. 3, c. 21, and 19 & 20 Geo. 3, c. 37; and by the 23 & 24 Geo. 3, c. 20, s. 2, an additional remedy is given by a representative action against the parish, analogous to the action against the Hundred in England. But the 3 & 4 Wm. 4, c. 78, which is the Grand Jury Act that preceded and was repealed by the Act of 1836, gave a right of compensation for injury to property much in the same terms as the 135th section of the Act of 1836; and the scope and object of these sections are merely to give the remedy for the injury coming precisely within the reasons and policy referred to in 2 East, Pleas

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of the Crown. The right to bring the action mentioned in the 23 & 24 Geo. 3, c. 20, was abolished by the Act of 1836. I also think the language of the 135th section itself supports the argument that "maliciously" must bear the second meaning I have referred to. It is coupled with the word "wanton," which is explained as "mischievous" in the preamble of 16 & 17 Vict. c. 38; and it seems to me strange that if a man was walking down Sackville-street and from motives of mere reckless mischief broke the window, compensation could be given, but under the same section none could be given if he broke it intentionally and deliberately with the view of abstracting the owner's property inside it. Taking the 135th section and the 5th sect. of the Local Government Act together, I think the argument is strengthened by the proviso referring to the Malicious Damage Act, which unquestionably applies, though there be no malice against the owner of the property. I apprehend that would be so under the words "unlawfully and maliciously" in section 51, but it is so expressly provided by section 58, and a prisoner could, I think, be convicted and punished for the misdemeanour of breaking the glass though he were also charged with the felony of stealing the jewellery, and it might form the subject of a separate charge under the Malicious Damage Act.

The dominant motive of Goodbody was robbery, but he also deliberately and intentionally committed the illegal act of breaking the glass. We were also referred to the case of *Rex* v. *Thomas Ross* (1) as an authority for the proposition that if the object of the offender was to steal, his act could not be wanton or malicious, but the case was decided upon the construction of a specific provision in the Black Act directed against any person "who shall unlawfully and maliciously break down the head or mound of any fish pond whereby the fish shall be lost or destroyed." It was proved that a part of the head or mound of one of the ponds had been cut down to a considerable depth by two persons of whom the prisoner was one so as to leave but little water in the pond, and that the fish were gone. It appeared to have been the object of the offenders to steal the

(1) Russell & Ryan's Crown Cases Reserved, p. 10.

fish and not to let them escape through the breach in the mound. The Judges upon a point reserved at the trial held that the clause did not extend to cases where the object of the party was to steal the fish. There the prisoner was indicted upon the words of the statute, including in the offence "whereby the fish were lost and destroyed," so that the case is only an authority upon the construction of the clause of the Black Act, which no doubt was strictly construed *in favorem vitæ*.

Skillen's Case (1)—a decision of the Chief Baron—supports, I think, the view that the act will be "malicious" though the perpetrator had a correlative object in view, and perhaps the dominant one—as setting fire to premises to obliterate the traces of a robbery. There are numerous other sections of the Grand Jury Acts giving compensation in certain cases which depend upon the particular language of the sections giving it, and therefore they have no bearing upon the point at present before us.

I am of opinion, notwithstanding the view of Mr. Justice Gibson in *Wilde's Case* (2), that the act of Goodbody in the present case was "malicious" within the meaning of the 135th section of the Grand Jury Act and 5th section of the Local Government Act, and that we should answer the question put to us by Mr. Justice Barton by stating that the application for compensation is sustainable in law.

HOLMES, L. J.:—

The question for decision is, whether the owner of a pane of plate glass broken by a thief, and in the course of committing a larceny of jewellery inside the window, is entitled to compensation under 6 & 7 Wm. 4, c. 116, sect. 135, as extended by the Local Government Act, 1898, sect. 5. This depends upon the meaning to be given to the adverb "maliciously" in these sections. "Malice" is one of those words which has a different signification when used as a term of legal art from what it bears in the language of ordinary life.

(1) 32 I. L. T. R. 32. (2) 2 New Ir. Jur. 169.

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Two phrases familiar to lawyers, "malice in law" and "malice in fact," give prominence to this distinction.

The malice of general literature and of our daily intercourse conveys that the feeling which the word describes springs from ill-will or antipathy towards its object. Such object is not necessarily an individual. It may be any person, thing, or institution capable of inspiring a spiteful or hostile sentiment. Legal malice is another thing.

"Malice in the legal acceptation of the word," said Lord Campbell, "is not confined to personal spite against individuals, but consists in the conscious violation of the law to the prejudice of another": *Ferguson* v. *Earl of Kinnoull* (1). "Malice," in the words of Blackburn, J., "may be defined to be where any person wilfully does an act injurious to another without lawful excuse": *Reg.* v. *Pembliton* (2). A burglar who kills a witness of his crime, although his only motive is self-protection, commits, in the familiar language of indictment, murder of malice aforethought. But while deliberation or wilfulness, as distinguished from spite, is generally sufficient in law to make a mischievous or injurious act malicious, there are exceptions to this rule, and malice may be used in a statute in its popular signification. An instance of this is to be found in the Black Act, passed by the British Parliament in the reign of King George the First, which declared certain malicious injuries to property to be felonies, and provided that the owners of the property thus feloniously injured might sue the Hundred within which the offence occurred for compensation. A long series of authorities settled that to constitute the felony thus created personal malice against the owner of the property was needed, and a similar construction was necessarily given to the provision as to compensation. I venture to think that this narrow construction was arrived at *in favorem vitæ*, and that if the Act had been confined to compensating for malicious injuries, a wider operation would have been given to it.

There were other statutes enacted subsequently to the Black Act which Mr. East (3) describes "as intended for the protection

(1) 9 Cl. & F. 251, 321. (2) L. R. 2 C. C. R. 119.
(3) Pleas of the Crown, vol. ii., p. 1062.

of the property itself from depredation." Referring to them, he says that "their whole scope shows that the word maliciously is only to be taken in its most general signification as denoting an unlawful and bad act, an act done *malo animo* from an unjust desire of gain or a careless indifference of mischief."

I am of opinion that section 135 of the Act of 1836 is of the latter class. It begins with cases of "maliciously or wantonly" destroying or injuring property by certain specified methods. Now, "wantonly" means recklessly, thoughtlessly, or without regard for right or consequences. It would be strange if damage arising from an act done in mere vacancy of mind, and without any intent to destroy or injure, should be made the subject of compensation, if damage inflicted wilfully and deliberately is outside the Act unless it is shown to be the outcome of spite or hatred. It is necessary, I think, for the sake of making the section consistent, to construe "maliciously" either when it occurs alone in the section or in juxtaposition to "wantonly" according to what Lord Campbell says (1), is its legal acceptation, "consciously violating the law to the prejudice of another."

Applications for compensation under the Grand Jury Act arise on Circuit, and few of them are reported; but we have all had some acquaintance with them, and I have never in my own experience known the doctrine of dominant motive referred to by Gibson, J., applied to them: *Wilde* v. *The Armagh County Council* (2). Indeed, the judgment of this Court in *In re Borrowes* (3) is quite opposed to this doctrine.

The final clause of section 5, sub-section 1, of the Act of 1898, is significant. That section extends section 135 of the old Act to maliciously setting fire to, destroying, or injuring property of any description, subject to the proviso that such extension is to be confined to cases where the malicious act is a crime punishable on indictment under the Malicious Damage Act, 1861. There is no doubt that the malice contemplated by the latter Act is not confined to malice conceived against the owner of the property, but exists where an act injurious to another is wilfully done without lawful excuse. The thief in this case broke the window

(1) 9 Cl. & F. 321. (2) 2 New Ir. Jur. 169. (3) [1900] 2 I. R. 593.

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wilfully, and it was no lawful excuse that he did so for the purpose of stealing jewellery. He could not have been prosecuted under the Malicious Damage Act, 1861, and also for larceny, but he could have been indicted for either offence.

It is perhaps anomalous that the owners of the property can claim compensation for injury to the window, and not for the loss of the jewellery. Legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief, and this is something to be thankful for, but until the law is changed they must pay for wilful destruction or injury to property even when the object of the culprit is to commit a larceny.

Solicitors for the applicant: *Hunter & Burland.*
Solicitor for the Corporation of Dublin: *Bonass.*

R. D. M.

M'TAGGART *v.* HOWARD (1).

Appeal.
1903.
Feb. 16, 24.

Practice—Debtors Act—Committal order—Order XLIV., Rule 4—Several instalments in arrear—Costs of committal order—Sheriff's fees.

A committal order, where the defendant has made default in paying instalments directed to be paid by him to the plaintiff in discharge of a judgment debt, should, as a general rule, be made for a single instalment, even though several instalments are in arrear.

The Court has power, in its discretion, to make the payment of the costs as well as of the instalment a condition of the debtor's discharge from prison.

Smith v. *Hamilton* (33 I. L. T. R. 91) overruled on this point.

Semble, the payment by the debtor of the sheriff's fees for executing the committal order should not be made a condition of the debtor's discharge.

APPEAL from an order of the King's Bench Division, dated February 2, 1903, made on the hearing of an application by the plaintiff for an order that the defendant be committed to prison for his default in paying certain instalments directed to be paid by an order of the Court.

On December 14, 1901, the plaintiff marked judgment against the defendant for £11 5*s.* debt, and £2 4*s.* costs, making together the sum of £13 9*s.* On February 24, 1902, the plaintiff having failed to levy the judgment debt by execution, obtained from the Divisional Court an order directing the defendant to pay the same to the plaintiff, with 1*s.* 8*d.* interest, making in all the sum of £13 10*s.* 8*d.*, by monthly instalments of £1 each, and a final instalment of 10*s.* 8*d.*, and also to pay to the plaintiff the sum of £1 3*s.* as and for the costs of the application.

The defendant paid two of the monthly instalments of £1 and no more, and on January 1, 1903, there were eight instalments in arrear. On February 2, 1903, the plaintiff applied for a committal order, basing his application on an affidavit showing that the defendant's income was the same as at the date of the instalment order, that he had only paid £2, that he had sufficient

(1) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

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means to pay the entire amount, but had made default. On this application the plaintiff contended that the committal order should be granted for the non-payment of eight instalments, and not one only. Thereupon the Court made the following order:—"It is ordered that the defendant, J. Howard, be, for default in payment of the hereinafter mentioned debt, committed to prison for the term of six weeks, or until he shall sooner pay to the plaintiff the sum of £1, being the amount of the instalment due on June 1, 1902, under the order herein dated February 24, 1902; and it is further ordered that the sheriff of Tipperary do take the said defendant for the purpose aforesaid, if he shall be found within his bailiwick; and it is further ordered that the defendant do pay to the plaintiff the sum of £1 3*s.* as and for the costs of this motion, but this order is not to be lodged for execution if the said defendant shall within one fortnight from the personal service of this order on him pay to the plaintiff the said sum of £1." From this order the plaintiff appealed.

W. Gibson, for the appellant:—

The King's Bench Division refused to make the committal continue until the eight instalments were paid, holding themselves bound by *Langford* v. *Laracy* (1), but the construction there placed on the Act was too narrow. The committal order is not a process of contempt, but in aid of execution: *Swan* v. *Dakin* (2). The committal should also continue until the costs are paid: 35 & 36 Vict. c. 57, s. 6; *Smith* v. *Hamilton* (3), where the contrary was held, is a Circuit decision. In any event it was decided on a County Court appeal: in the Superior Courts Order XLIV., Rule 5, expressly enables the Court to make the committal continue until payment of costs. The Form No. 20 in Appendix K is to the same effect. The order appealed from by the concluding direction will prevent the plaintiff ever recovering the costs if the defendant pays a single instalment.

Cur. adv. vult.

(1) 18 I. L. T. R. 39. (2) 16 C. B. at p. 64. (3) 33 I. L. T. R. 91.

Appeal.
1903.
M'TAGGART
v.
HOWARD.
Feb. 24.

FITZGIBBON, L. J. :—

This is an *ex parte* appeal by the plaintiff from an order which he obtained from the King's Bench Division directing the defendant to be committed to prison for six weeks, or until he shall sooner pay to the plaintiff the sum of £1, being one instalment of a debt directed to be paid by instalments by an order of February 24, 1902. Eight instalments are unpaid, and the plaintiff contends that the committal order should not have been limited to the payment of one instalment, but should be enforceable unless the defendant pays all the eight instalments that are in arrear.

The plaintiff marked judgment against the defendant in December, 1901, for £11 5*s.* debt and £2 4*s.* costs, £13 9*s.* in all. The defendant is living in barracks, with no goods available for execution. He is an unmarried man, with no one dependent on him, and he is in receipt of a monthly cash income of £4 15*s.* The judgment not having been satisfied, the King's Bench Division, by the order of February 24, 1902, on proof of these circumstances, directed him to pay the debt by monthly instalments of £1 each. He paid two instalments, and he has left eight unpaid, up to January 1, 1903.

An instalment order of this sort is in the nature of an adjudication upon the pecuniary condition of the defendant—a judicial determination that he can pay the debt by the prescribed instalments, but that he can not pay more than one instalment at a time, nor anything in the nature of a lump sum. Such an order should be regarded by the plaintiff as an intimation that, if he does not insist on getting the instalments as they fall due, he will be allowing the debtor to drift back into the condition of indebtedness from which the instalment order was intended gradually to extricate him. Both in common sense and in practice instalments ought not to be allowed to accumulate. Whatever may be the jurisdiction, there is great unwillingness on the part of the Court to help a plaintiff, if he, who neglects to enforce regular payment of the instalments, suddenly comes down upon the debtor for an accumulation of arrears. To grant a committal order for the eight instalments now due would, in effect, be to undo the instalment order, and to make the whole debt payable in one sum.

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In such cases in general, and in this case in particular, the non-payment of each instalment must, in my opinion, be regarded as a distinct contempt, and I think that each committal order should be for the non-payment of one instalment; whether, and on what terms, successive orders should be given, should depend on the circumstances of each case, and the order of the King's Bench Division limiting the committal to one instalment here was right.

Mr. Gibson next objects because the committal order was not extended to the costs of obtaining the instalment order. When Howard was directed to pay the debt by instalments he was also directed to pay £1 3*s*. for the costs of the application. The King's Bench Division refused to enforce these costs by committal, and Mr. Gibson contends that they should be enforced in the same manner as the first instalment. *Smith* v. *Hamilton* (1) was referred to as an authority for the proposition that in the County Court there is no power to include such costs in the committal order; and Palles, C.B., is reported to have indicated an opinion that there was no such power in the High Court. Since the argument I have mentioned the matter to the Lord Chief Baron, and I understand from him that he has had occasion to reconsider the question, and that he has, in some instances, and subject to certain conditions, enforced payment of costs by committal. After full consideration, we have arrived at the conclusion that, both in the High Court and in the County Court, there is jurisdiction to order that payment of "the prescribed costs," in addition to the instalments, shall be a condition of the debtor's discharge from committal. It is, however, a matter of discretion with the Court. There may be cases where it should not be done, but certainly in this case it would be a very unsatisfactory result of the order made under the Debtors Act, if the plaintiff were put to the additional expense of £1 3*s*., which he could not recover by committal, in order to make the defendant pay an instalment of £1. The Debtors Act, sect. 6, and the Forms and Rules, both in the High Court and in the County Court, appear to us to imply that payment of "the prescribed costs" of obtaining the order may be

(1) 33 I. L. T. R. 91.

made a condition precedent to the debtor's discharge. We further think that these "prescribed costs" include costs of prescribed amount awarded under Order XLIV., Rule 4—in this case the sum of £1 3*s.*—and we hold that these costs should be added to the instalment of £1, and that payment of both sums should be made a condition precedent to the debtor's discharge. The order of the King's Bench Division must therefore be varied by directing that "the defendant be for default in payment of the hereinafter mentioned debt and costs committed to prison for the term of six weeks, or until he shall sooner pay to the plaintiff the sum of £1, being the amount of the instalment due on the 1st day of June, 1902, under the order of the 24th day of February, 1902, together with the further sum of £1 3*s.* as and for the costs of the motion of the 24th day of February, 1902." Debtors will henceforth understand that while instalment orders remain in force disobedience will bring with it the additional penalty of costs.

The third point raised by Mr. Gibson concerns the last clause of the order of the King's Bench Division, which undoubtedly conveys that the order is not to be lodged for execution at all, if the defendant within one fortnight after service pays £1. This would deprive the plaintiff of the means of levying the costs of the motion which that order awards him. We cannot believe that the Court intended this. The order must not be lodged for execution with the sheriff *for the purpose of arresting the defendant*, if he pays the instalment of £1 and the £1 3*s.* for costs within a fortnight. We will allow two guineas for the costs of this appeal; these costs will not be included in the committal, but they, with the costs of obtaining the committal order awarded by the Court below, will be recoverable by ordinary process of execution.

WALKER, L.J.:—

I concur. I rely on Order XLIV., Rule 4, which says:—"The Court or a Judge in making an order for committal to prison under the 6th section of the Debtors Act (Ireland), 1872 (35 & 36 Vict. c. 57), may either make such imprisonment determinable on payment of the whole sum in respect of which the person to be imprisoned is in default, together with such costs as

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the Court or a Judge shall think fit; or may order the debt to be paid by such instalments as the Court or a Judge shall think fit, and make the imprisonment determinable on payment of such costs and such of the said instalments as the Court or Judge shall think fit; and in either of such cases the Court or Judge may direct payment of a sum in gross in lieu of taxed costs." Nothing can be plainer than that. The Court is given power to measure the costs and to make the imprisonment determinable on payment of such costs.

HOLMES, L. J. :—

It is to be regretted that we are obliged, after hearing arguments on one side only, to decide an appeal in which we have been asked to alter in two important particulars the practice of the King's Bench Division under the Debtors Act (Ireland), 1872. Although Mr. Gibson has brought to our notice the authorities against himself with commendable candour, I should have wished to hear counsel for the defendant before disposing of the case.

It has been, I believe, the well settled practice, not only of the Kings' Bench Division, but of the Divisions now amalgamated therewith, where an order for payment of a judgment debt by instalments has been made, and where after two or more instalments have become due a committal order is applied for, that such order, if given, will be confined to a single instalment. Andrews, J., in the case to which we have been referred has held that this is required by the language of the statute. I throw no doubt upon this proposition; but I may say that even if there were jurisdiction to commit unless and until more than one instalment was paid, I should still be of opinion, for the reasons given by Fitz Gibbon, L.J., that the practice of the Divisional Court coincides generally, if not always, with what ought to be done in the exercise of a sound judicial discretion. At all events, there is no reason for departing from it in the present case; and this disposes of Mr. Gibson's first objection to the order appealed from. His second point is more difficult.

If I recollect aright, the practice in the King's Bench Division when I was a member of the High Court was that the order of

committal provided that the imprisonment should be determinable on payment of such costs as the Court or Judge thought fit in addition to the debt. This order is in strict accordance with the Rules of 1891, Order XLIV., Rule 4; and I was surprised to hear that for some time there has been substituted for it an order in the form appealed from, which, while specifying a sum for costs, provides that the defendant will be entitled to his discharge on payment of the instalment only. We have not been told the reason of the change. I have no doubt that it was carefully considered; but I cannot account for it if the rule-making authority had jurisdiction to make Order XLIV., Rule 4. Section 6 of the Debtors Act provides that any person imprisoned thereunder shall be discharged out of custody on a certificate signed in the prescribed manner to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any). Section 10 enacts that the term "prescribed" means as respects the Superior Courts of Common Law prescribed by general rules to be made in pursuance of the Common Law Procedure Act, 1853. Some such general rules rather carelessly prepared were made shortly after the passing of the statute; but neither then nor since has there been a general rule prescribing either the amount of costs or a scale of costs of a committal order. In this state of things I can understand it strongly argued that there are no prescribed costs within the meaning of section 6, and this is the point upon which I should especially have wished to hear counsel for the defendant. The question I think turns upon whether a general rule prescribing that the costs shall in each case be fixed by the Court or Judge that makes the order would be within the authority conferred by the statute. If it would, we have such a rule in Order XLIV., Rule 4. The inclination of my own mind is to answer this question in the affirmative; and I am certainly not prepared to hold that one of the Rules of 1891, recommended by a large majority of the Judges, is without jurisdiction. For these reasons, I concur in the judgment of the Court.

The form of committal order given in the schedule to the Rules of 1891 deviates from the terms of Order XLIV., Rule 4,

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by introducing sheriff's fees; and I am of opinion that this part of the form ought to be omitted.

Solicitor for the appellant: *A. Lane Joynt.*

G. Y. D.

K. B. Div. 1903. Feb. 27. *Appeal.* April 16.

HAMILTON & CO. *v.* CONINGHAM (1).

(1902. No. 2531.)

Practice—Debtors Act (Ireland), 1872—Order to pay judgment debt by instalments—Default in payment of instalment—Committal order—Officer in the army—Public policy.

A committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor by instalments will be granted against the debtor, though he is an officer in the army, and the only income of which he is proved to be in receipt is his pay as such officer.

ADJOURNED SUMMONS.

Application on behalf of the plaintiffs that the defendant H. J. Coningham be committed to prison for non-payment of the instalments payable under the order of the King's Bench Division, dated 1st November, 1902, by which defendant was ordered to pay to the plaintiffs the sum of £12 12*s.*, being the amount due on foot of the judgment in this action, dated 2nd April, 1902, for principal interest and costs, in the following instalments, viz. a sum of £4 on or before the 1st December, 1902, a like sum of £4 on or before the 1st January, 1903, and the balance, a sum of £4 12*s.*, on or before the 1st February, 1903.

The defendant was duly served with notice of the application on which the above-mentioned order was made, but he did not appear at the hearing of the application. It was proved that he was a captain in the army, unmarried, in receipt of pay to the amount of eleven shillings and sevenpence a day, and that the

(1) Before GIBSON, BARTON, and WRIGHT, JJ.

debt was the amount of a tailor's bill. The defendant was duly served with a copy of the said instalment order in the military barracks at Birr, but he failed to pay any of the instalments therein mentioned. The plaintiffs took out a summons asking that the defendant be committed to prison for his default in failing to pay the said instalments. There was no appearance by the defendant on this application, and Mr. Justice Barton adjourned the summons into Court.

W. H. Brown, for the plaintiffs.

GIBSON, J. :—

This application for a committal order against a commissioned officer in the army raises some novel and interesting questions. The plaintiff, a tailor, has recovered judgment for £10 3*s.* 9*d.*, and on *fi. fa.*, a return of *nulla bona* having been made, obtained on November 1, 1902, an instalment order on which nothing has been paid. The defendant, a captain in the Leinster Regiment, has not appeared to give any explanation for his non-compliance with the order. It does not appear from the plaintiffs' affidavit, which is extremely meagre, that defendant has any means outside his military pay.

That the jurisdiction of the Court is not ousted by the defendant's character of officer is unquestionable. An officer has no privilege against civil any more than against criminal process. Long ago the Crown used to grant to individuals engaged on active military service a special limited privilege of protection (3 Christian's Blackstone, 289). The last known instance of this exercise of the Royal prerogative (which it is not easy to reconcile with the provisions of Magna Charta as to delaying justice) occurred in 1692 in a case of *Barrudale* v. *Lord Cutts* (1). The plaintiff, also a tailor, sued Lord Cutts while the latter was absent at the war in Flanders, and was proceeding to outlawry against him when the defendant obtained protection under the Great Seal staying the proceedings for a time. There is no trace of suggestion anywhere that an officer enjoyed any privilege by reason

(1) 3 Lev. 332.

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of his military position. Tidd, 8th ed., p. 201, states that the statutes protecting soldiers from arrest, which go back as far as 1 Geo. 2, stat. 2, c. 14, do not extend to commissioned officers. In *Arkenheim* v. *Colegrave* (1) and *Larchin* v. *Willan* (2) officers were arrested in actions of debt under 1 & 2 Vict. c. 110 when about to leave the kingdom on active service. The omission of officers from the protection given by the Army Act to non-commissioned soldiers is decisive that the former enjoyed no immunity from arrest. As a committal order is in the nature of punishment and is not execution (*Re Watson* (3)) in any view, it appears certain that it can be made against an officer.

Next: Is the jurisdiction of the Court affected by the circumstance that the officer's sole apparent means of paying the instalment order is his military pay, which on grounds of public policy cannot be directly assigned or dealt with by him? Apart from authority, on principle, I would think that if at the time of application the defendant "has or has had since the date of the judgment or order means" it is quite immaterial from what source the means have been derived, whether from gift or otherwise: *Ex parte Koster* (4). The money in its origin may be the official pay or salary of a civil, judicial, or military servant of the Crown, or may be income on which a valid restraint on anticipation has been imposed. Once it is "at home," paid over and received by the person entitled, it is a free fund which may be assigned, and it is liable for the payment of the owner's debts. My opinion would be the same, even if salary could not be reached by a receiver order, as in *Picton* v. *Cullen* (5).

In some of the cases there would appear to be some confusion between orders directly attaching pay and salary before receipt, and instalment orders which proceed on money actually received. Orders of the former type arrest the pay before it reaches the defendant, while orders of the latter class deal with the defendant after the pay has become his own proper money, and has lost the character of official pay and salary.

Picton v. *Cullen* (5) strongly supports the view that an instal-

(1) 13 M. & W. 620.
(2) 4 M. & W. 351.
(3) [1893] 1 Q. B. 21.
(4) 14 Q. B. D. 597.
(5) [1900] 2 I. R. 612.

ment order is competent in the case of a public official. It was there held that a receiver order could be made in respect of the salary of a National schoolmaster after it became due, but before it was payable. The objection that this would enable a creditor to evade the policy of the law by stopping the salary before it reached the payee was overruled by the Court. The *ratio decidendi* of the Court appears to extend to all official inalienable salaries. The question appeared to me so grave that on an *ex parte* application for a receiver over a petty sessions clerk's salary, a judicial officer, I declined to make the order, but the Court of Appeal reversed my order and appointed the receiver. It is unfortunate that the attention of the Court was not directed in *Picton* v. *Cullen* (1) to the decision of the English Court of Appeal ten years before in *Crowe* v. *Price* (2), where it was apparently held by Lord Esher, Bowen and Fry, L.JJ., that arrears of a pension preserved their inalienable character until they were reduced into possession and paid over to the pensioner. In *Picton* v. *Cullen* (1) the salary was due but not payable, and I find it impossible to reconcile the two decisions. *Hood Barrs* v. *Heriot* (3) was decided in the interval between these conflicting decisions, but there may be a distinction between inalienability imposed by act of party and inalienability growing out of grounds of public policy.

I am not aware of any reported case, however, in which an instalment order has been made where the debtor's official pay constitutes his sole means. The decision of Harrison and Holmes, JJ., in *Morgan* v. *Eyre* (4) would appear adverse to such an order even where there was receipt of income since the judgment. That decision has not been expressly overruled, but I think it can hardly stand with *Picton* v. *Cullen* (1). *The Bank of Scotland* v. *Cunningham* (5) is not in point, as there no part of the pension had been received since the date of the judgment.

If there is jurisdiction, is the case one where the Court ought to make an order of committal which would be undoubtedly of first impression? The debt is not a large one; it is for a tailor's

(1) [1900] 2 I. R. 612.
(2) 22 Q. B. D. 429.
(3) [1896] A. C. 174.
(4) 20 L. R. Ir. 541.
(5) [1899] 2 I. R. 780.

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account, and the defendant has given no explanation of his failure to meet the instalment. My mind has fluctuated. On the one hand, I cannot assent to the principle that any public servant, if his salary is sufficient, can be permitted to treat his office under the Crown as clothing him with the ancient privileges of Alsatia against his creditors; on the other, I must bear in mind that the salary allowed by State is often insufficient, without the aid of private resources, to enable an official position to be maintained.

The jurisdiction is punitive for contumacious disregard of an obligation which the debtor has the ability to discharge. A committal order is not like *ca. sa.*, a form of execution. To commit this officer might possibly involve the forfeiture of his commission. The affidavit of the plaintiff hardly supplies sufficient information to justify the Court in making an order of which there has been no precedent before, and which might entail such serious consequences to the defendant. The defendant has not appeared, and a decision against him would not be reviewed elsewhere; whereas the plaintiff can take the whole question to the Court of Appeal, where the law on this subject (including *Morgan* v. *Eyre* (1) and *Crowe's Case* (2)) can be considered and authoritatively settled. A case of dishonest contumacy is not conclusively made out to warrant an order of committal. Beyond the fact that defendant is a captain and is unmarried, we know nothing; of his real financial position—his debts and expenses, and his ability to pay the plaintiff's claim—we have no information.

BARTON, J., concurred.

WRIGHT, J.:—

I concur, but with some doubt. I entirely concur with my brother Gibson that the affidavit is extremely meagre; when analysed it reduces itself to this, that the defendant is a captain in the Leinster Regiment drawing full pay. I do not think that it follows from what is stated in the affidavit that the defendant comes within the category of fraudulent debtors; I am not satisfied that it has been shown that the defendant has had since the date

(1) 20 L. R. Ir. 541. (2) 22 Q. B. D. 422.

of the judgment the means to pay and has refused to pay. As we are exercising what Mr. Justice Madden in *Blair* v. *Coghlan* (1) calls a "quasi criminal" jurisdiction, I do not think that we should make the order asked for.

In *Morgan* v. *Eyre* (2) Harrison and Holmes, JJ., refused to make an order for payment by instalments against a married woman whose only separate estate was subject to a restraint on anticipation, although it was proved that since the date of the judgment she had received income of her separate estate. In the *Bank of Scotland* v. *Cunningham* (3) the Queen's Bench Division refused to make an order for payment by instalments against a Customs pensioner, Boyd, J., dissenting. It is true that in that case it appeared that no part of the pension had been received since the date of the judgment; and O'Brien, J., states:—"If it were shown that any of the pension had been received it would be different. But the intention here is to appropriate the future gales of the pension, and I am satisfied that there is no evidence to satisfy the Court that the defendant is of present ability to pay."

Probably neither of the above decisions can stand consistently with the later decision in *Picton* v. *Cullen* (4). However, they are decisions of this Division, and I prefer, if they are to be overruled or distinguished, that this should be done by the Court of Appeal and not by us, more especially as we are asked here to make an order committing this defendant in respect of a very small debt.

R. ST. J. C.

Appeal. April 16.

The plaintiffs appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, LJJ.)

W. H. Brown, for the appellants.

(1) 33 I. L. T. R. 20, at p. 21.
(2) 20 L. R. Ir. 541.
(3) [1899] 2 I. R. 780.
(4) [1900] 2 I. R. 61

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LORD ASHBOURNE, C.:—

The plaintiffs obtained judgment for a debt against the defendant, who is an officer in the army, and issued execution thereon for a sum of £12 12*s.* The execution proved fruitless, and the plaintiffs on an affidavit as to the defendant's means obtained an order directing him to pay the £12 12*s.* in instalments of £4 each, the first instalment to be paid on December 1, 1902. The defendant failed to pay the first instalment when it fell due, and up to the present has paid nothing in respect of the said order. Accordingly, the plaintiffs applied to the King's Bench Division for an order that the defendant be committed to prison for his default in paying the instalments. The application was heard by three Judges of the King's Bench Division, who left the pleasure of making the order to the Court of Appeal. There was no appearance by the defendant either in the Court below or here. There is no point raised as to the defendant's means, but it is suggested that to make the order would violate public policy. In my opinion the decision of this Court in *Picton* v. *Cullen* (1) shows that it is not against public policy that the order applied for should be granted. This is not an application to attach a particular portion of a public officer's pay, but it is an attempt to enforce under the Debtors Act payment of a judgment debt due by an officer to the plaintiffs for goods which he obtained from them. I can see no public policy to prevent the plaintiffs from obtaining payment of their debt by the compulsion of an order committing the defendant to prison for his default in complying with the order to pay the debt by instalments.

We accordingly make the order, limiting it, however, to the default in paying the first instalment. If the defendant pays it he can, if necessary, be called upon to pay the subsequent instalments in the same manner. But the defendant may deem it judicious, now that the law has clearly spoken, to pay the debt as directed by the instalment order, so as to avoid the expense of future applications.

(1) [1900] 2 I. R. 612.

FITZ GIBBON, L. J. :—

Our order will be in the same terms as that in the former case—"Discharge the order of the King's Bench Division, and in lieu thereof direct that the defendant be, for default in payment of the hereinafter mentioned debt and costs, committed to prison for the term of six weeks, or until he shall sooner pay to the plaintiffs the sum of £4, being the amount of the instalment due on the 1st day of December, 1902, under the order of the 1st day of November, 1902, together with the further sum of £2 2*s.* as and for the costs of the motion of the 27th day of February last; and let the defendant pay to the plaintiffs £4 4*s.* as and for the costs of this appeal."

The effect of giving the £4 4*s.* costs in this way will be to make that sum recoverable by the ordinary process of law. It is safer to limit the order for committal to one instalment, as each default is a separate contempt.

In my opinion, there should be no special difficulty, on the ground of public policy, in issuing execution to enforce payment of a debt due by a person in receipt of pay or salary as a public servant. Even assuming it to be against public policy that the income of such people should be taken in execution, it is also contrary to public policy to allow them to receive their income, and to apply it to other purposes, leaving their just debts unpaid. The order to pay in instalments is only a new and convenient means of compelling a person to pay his debts, whose income cannot otherwise be reached, and who has the means of paying, and no just excuse for not paying. The old law is not changed; the process is improved. In my opinion, the King's Bench Division should have made the order, for the reasons given by Gibson, J.

WALKER, L. J., concurred.

HOLMES, L. J. :—

I am surprised at the hesitation shown by the King's Bench Division in this case. During the argument I looked into the report of the judgment of Madden, J., in *Blair* v. *Coghlan* (1), and

(1) 33 I. L. T. R. 20

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I find it rightly expresses the view which I believe prevailed in such matters in the King's Bench Division when I was a member of that Division. I cannot recall any case in which a committal order was made against a military officer, but I can recall many instances in which such orders were made against other public officials whose imprisonment would seriously inconvenience the public.

Gibson, J., has given good reasons for making the committal order asked for, and I think that the logical conclusion therefrom is to allow this appeal.

Solicitor for the plaintiffs: *R. J. Porter.*

G. Y. D.

O'GORMAN *v.* O'GORMAN (1).

(1901. No. 5575.)

K. B. Div.
1902.
Nov. 20

Negligence—Bees—Kept in unreasonable numbers and at an unreasonable place—Negligence in the management of bèehives—Smoking hives, with knowledge of danger to those in the immediate neighbourhood—Remoteness of damage.

Plaintiff and defendant resided on adjacent farms. Defendant, who was a farmer acquainted with the ways and management of bees and horses, placed and kept upwards of twenty beehives at some distance from his own stables and farmyard, at the boundary fence beside plaintiff's yard and haggard. The bees swarming from these hives frequently caused annoyance to, and gave rise to complaints from, the inhabitants of the farm upon which plaintiff resided. On the occasion in question defendant proceeded to the hives for the purpose of removing honey, and for that purpose smoked the hives with a "smoker." For his own protection he wore a crape veil and a suit of sting-proof garments. There was evidence that he knew, or ought to have known, that plaintiff was likely to be tackling his horse at this very spot, and that his horse was there, but he did not warn plaintiff, or take any other precaution on his account. Numbers of bees, irritated by the smoking operation, swarmed upon plaintiff and his horse. The horse, stung by the bees, dragged plaintiff and threw him violently against a wall, causing very severe injuries to his spine. The jury found that plaintiff's injuries were caused by the bees having stung plaintiff and his horse; that they were kept on defendant's land negligently, in unreasonable numbers, at an unreasonable place, and with appreciable danger to the inhabitants of the adjoining farm; that the bees were, to the knowledge of defendant, of a dangerous and mischievous nature, and accustomed to sting mankind and domestic animals; and that the honey was not taken from the hives on the occasion in question with reasonable care, skill, and prudence; and returned a general verdict for the plaintiff, with £200 damages:—

Held, that, having regard to the special facts of the case and findings of the jury, the verdict ought not to be disturbed.

Held, also, that the damage was not too remote.

ACTION for damages for injuries inflicted by bees. The plaintiff Patrick O'Gorman was the son of a farmer residing at

(1) Before KENNY, BARTON, and WRIGHT, JJ.

K. B. Div. 1902.

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Gurtnalougha in the county Clare. The defendants Peter O'Gorman and Michael O'Gorman, father and son, were farmers occupying land adjoining that of the plaintiff's father. Some years prior to the month of September, 1900, the defendant Michael O'Gorman placed two straw beehives on his lands, and the number was increased year by year until upon the date in question there were in a row from fourteen to twenty beehives of various descriptions at the boundary fence of, and in close proximity to, the dwelling-house and haggard of the plaintiff's father. Complaints had been made upon two or three occasions by the plaintiff and his father to the defendants of annoyance caused by the swarming of the bees. Men engaged in haymaking were obliged to cease working, and shortly before the date of the occurrence in question the plaintiff, who had been attacked while digging potatoes, complained to the defendant Peter O'Gorman, whose observation in reply was, "Are they prodding you?" Upon the 20th September, 1900, about midday, the plaintiff brought a horse into the farmyard near the boundary fence where the beehives were placed, and close up to the door of his father's dwelling-house, for the purpose of harnessing it. This was his usual time and place for harnessing the horse. The harness, which was in the kitchen, was handed to him by his mother. He had put on the winkers and long reins, and was putting on the collar and harness when a swarm of bees came across the low wall and whitethorn hedge which separated the two farm premises. Many of the bees perched on the horse, which immediately took fright, and as it started and turned plaintiff's foot caught in the reins. He was thrown against a low wall and was crushed against it by the head and breast of the horse. His back was bent over the wall. He endeavoured to get into the cow-house, but he was knocked down again by the horse at the gable of the dwelling-house. The horse then escaped from the haggard. The plaintiff at the time felt his back slightly hurt, the sight was taken from his eyes, and he was badly stung by the bees.

The bees that swarmed into plaintiff's yard, and stung plaintiff and his horse, were at the time driven from the neighbourhood of the hives by a "smoker," which was being applied to some of the hives by Michael O'Gorman, with the object of removing

honey. The defendant admitted that he knew the danger of such an operation to persons in the immediate neighbourhood. He wore a large hat and a crape veil over his face; he had his hands covered and a cloak thrown over his body, all as protection against the viciousness (or stinging) of the bees. Defendant admitted that he knew that plaintiff was in the habit of coming to that place to tackle his horse, and that he saw the horse there and on previous occasions, and it was proved that this was the usual time for plaintiff to come there to tackle his horse. It was stated that after the plaintiff was thrown down the defendant was called to by plaintiff's mother to come to plaintiff's assistance, but that he answered that he had not time.

About a fortnight afterwards the plaintiff became weak and went to the Clare Infirmary. He attended the trial, which took place before Mr. Justice Johnson and a jury at Limerick Spring Assizes, 1902, and gave evidence on his own behalf. The medical evidence given in support of his case was to the effect that he was suffering from conditions which would have been produced by the spine being acutely bent and the cord or membrane injured when forced on the wall. Medical evidence was given for the defendants to the effect that his condition was due to disease on both sides of the spine, and not to external injury inflicted at so recent a date as the 20th September, 1900. The defendants' ownership of the hives was also denied, it being alleged that when defendant Michael O'Gorman was appointed cess collector in 1895 he sold six or seven of his hives and gave the rest to his sister Bridget, who had since retained them as her property. The jury found both of the issues so raised in favour of the plaintiff.

Between the trial of the action and the hearing of the new trial motion the plaintiff died, and the action was revived in the name of his personal representative.

The following were the questions left to the jury and the answers:—

1. Were the injuries complained of caused by the bees having attacked and stung the mare and the plaintiff on the 20th September, 1900. *Answer—Yes.*

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2. Were the said bees the property of Peter O'Gorman, Michael O'Gorman, or Bridget O'Gorman? *Answer*—Michael O'Gorman.

3. If of Michael O'Gorman, did he keep the bees on the land of the defendant Peter O'Gorman with his licence and permission? *Answer*—Yes.

4. Were said bees kept on said lands negligently? *Answer*—Yes.

5. Were said bees kept on said lands in an unreasonable number, or at an unreasonable place, or with appreciable danger to the inhabitants of O'Gorman's adjoining farm? *Answer*—Yes.

6. Were said bees to the knowledge of the defendants, or either of them, and which of the defendants, of a dangerous and mischievous nature and accustomed to sting mankind or domestic animals? *Answer*—Yes, of both defendants.

7. Was the honey taken from the hive on the 20th September, 1900, with reasonable care, skill, and prudence? *Answer*—No.

8. Was the plaintiff guilty of the alleged negligence? *Answer*—No.

9. And if so, could the defendants by the exercise of ordinary care have avoided the consequence of plaintiff's negligence? *Answer*—Reply to No. 8 disposes of this.

10. Find damages? *Answer*—£200.

Upon these findings the learned Judge entered judgment for the plaintiff for £200 damages and costs.

The defendants moved to set aside the verdict and to have one entered for him on the grounds—(1) that the evidence disclosed no cause of action against the defendants or either of them; (2) that the evidence as to the numbers, place, and manner in which the bees were kept and in which the honey was taken on the 20th September, 1900, disclosed no case against the defendants either of actionable nuisance or actionable negligence, or of unreasonable or improper user of the lands; (3) that there was no evidence that the injuries to the plaintiff were caused by such alleged negligence or nuisance; (4) that the bees being animals "feræ naturæ" over which the defendants had no control, the

defendants were not liable for their acts outside the defendants' lands; (5) that the bees were not the property of either of the defendants; (6) that there was no evidence proper to be submitted to the jury in support of any of the issues left to them; (7) that the damage claimed for was too remote; and (8) that the learned Judge was in error in not acceding to the requisitions submitted on behalf of the defendants; or in the alternative for a new trial.

Matthew J. Bourke, K.C. (with him *Redmond Barry, K.C.*, and *Phelps*), for the defendants:—

Bee culture is an industry as old as the world itself, and never before has an action of this kind been instituted. Cases of liability for injury by ordinary domesticated animals afford no analogy. They rest on the principle that the owner of such animals is liable for injuries which are the natural result of allowing them to escape from his control. It is the same principle that governs the liability of parties who choose to bring any matter on their lands which may cause injury if it escapes. The cases of *Cox* v. *Burbidge* (1) and *Fletcher* v. *Rylands* (2) explain this principle and the limits of its application. It is on the same basis that the liability for wild animals which have been domesticated rests. Their owner by taking them into his keeping undertakes the duty of so controlling them as to prevent their doing mischief. If they escape from such control and do harm he is responsible (*Brady* v. *Warren* (3)). These considerations have no application to bees, whose nature and necessities of existence preclude all possibility of controlling them.

The impossibility of keeping certain animals under restraint, and the slightness of the damage ordinarily caused by them, are well recognised grounds of immunity in respect of them. In *Read* v. *Edwards* (4), Willes, J., notices the distinction between oxen and dogs or cats on account of the difficulty or impossibility of keeping the latter under restraint, secondly, the slightness of the damage which their wandering ordinarily causes, and

(1) 13 C. B. (N. S.) 430.
(2) L. R. 3 H. L. 330.
(3) [1900] 2 I. R. 632.
(4) 17 C. B. (N. S.) 245, at p. 260.

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thirdly, the common usage of mankind to allow them a wider liberty.

Once it is conceded that a man may keep bees, his right to keep something that he cannot control is acknowledged, and leaves him free from liability for their unexpected or unusual fits of viciousness. At the trial of this case there was no evidence either direct or on cross-examination pointed at any specific negligence causing the injuries. The use of the veil in protection of the person removing the honey was the ordinary and invariable precaution on such occasions. It evidenced no consciousness of any particular danger to third parties. There was no evidence that the character of the hives used had anything to do with the occurrence. There was no evidence that the locality in which or the numbers in which the hives were kept constituted negligence in the defendants' mode of managing them, or occasioned or contributed to the injuries. In the absence of evidence to that effect there was nothing in this case but the fact that the defendants were owners of bees which stung the plaintiff's horse. In that state of things to hold the defendants liable would be to establish that the owner of one hive would be responsible for a sting inflicted by a single bee from that hive, no matter how far from the locality of the hive.

The doctrine of scienter has no application. It is common knowledge that once a bee stings it loses its sting and dies.

Furthermore, the damage here is too remote. It was the result of the horse bolting and the plaintiff getting entangled in the reins. The occurrence was an accident upon an accident.

[The following cases were also referred to:—*Sanders* v. *Teape* (1), *Brown* v. *Giles* (2), *Lee* v. *Riley* (3), *Osborne* v. *Chocqueel* (4); United States Digest—Title, Animals, 271.]

The Solicitor-General (*Campbell, K.C.*), and *Bushe, K.C.* (with them *Lynch*), for the plaintiff:—

There was ample evidence to support the findings that the bees were kept in excessive numbers and too close to the plaintiff's

(1) 51 L. T. (N. S.) 263.
(2) 1 Car. & P. 118.
(3) 18 C. B. (N. S.) 722.
(4) [1896] 2 Q. B. 109.

farm. The defendant's appreciation of the dangerous nature of the operation he was about to engage in is proved by the precautions he took to protect himself. He was under an obligation to give his neighbours an opportunity of taking similar precautions or of getting beyond the reach of the bees, yet he gave no warning to the plaintiff or the other occupants of the adjoining farm.

Upon the authority of the United States decision scienter may be gathered from the fact that the animals causing the injury were of a ferocious species. There is no proof whatever that when a bee uses its sting it dies.

The damage is not too remote. A man is responsible who puts in motion a regular chain of events which finally cause the injury: *Scott* v. *Shepherd* (1).

[The following cases were also referred to:—*Vaughan* v. *Menlove* (2), *Smith* v. *London and South-Western Railway Company* (3), *Lawrence* v. *Jenkins* (4), *Jones* v. *Boyce* (5), *Byrne* v. *Great Southern and Western Railway Company* (6), *Bell* v. *Great Northern Railway Company* (7), *Clark* v. *Chambers* (8)].

Barry, K.C., in reply.

KENNY, J.:—

Nov. 21.

We think we are in a position now, upon the very full argument we have heard in this case, to dispose of it without letting it stand for judgment. Upon the view we take, it has really been disposed of by the findings of the jury. The defendant's notice of motion asks that the verdict for the plaintiff may be set aside, and that a verdict be entered for the defendants on the grounds—[His Lordship read the grounds set forth in the notice of motion].

The case is an interesting and, to some extent, a novel one. The trial took place before Mr. Justice Johnson at the Spring Assizes of the present year, in the city of Limerick, with a special jury. The circumstances seem to have been very fully investigated, and the learned Judge seems to have given the jury

(1) 2 Wm. Bl. 893; 1 Sm. L. C. [480.
(2) 3 Bing. (N. S.) 468.
(3) L. R. 6 C. P. 14.
(4) L. R. 8 Q. B. 274.
(5) 1 Stark. N. P. 493.
(6) Unreported.
(7) 26 L. R. Ir. 428.
(8) 3 Q. B. D. 327.

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adequate instructions, and to have taken their opinion upon every material question. The trial resulted in a verdict for the plaintiff for the sum of £200.

The case is a sad one in this—that the plaintiff has died since the trial, in consequence, I cannot but infer, of the injuries sustained on the 20th September, 1900. It is manifest that he was telling the truth at the trial when he stated that he was unable to do a single day's work. The suit has been revived at the instance of his personal representative.

The statement of claim alleges that in September, 1900, and for some time previously, the defendants wrongfully, negligently, and injuriously kept on their lands a swarm, or swarms, of bees, well knowing that the said bees were of a dangerous and mischievous nature, and accustomed to sting mankind and domestic animals—that on the 20th September, 1900, the plaintiff was on his father's land, adjoining the defendants', doing his father's business, and having in his charge, and under his control, a horse the property of his father—that the bees swarmed on and attacked the plaintiff and the horse, and whilst the plaintiff was endeavouring to protect the horse, and to save and extricate himself from the swarm of bees, the plaintiff was severely stung and injured by the bees, and was knocked down and dragged along the ground, and struck against the wall by the horse, and sustained permanent injuries, and was permanently disabled. To that statement of claim every imaginable plea was put in, including one of contributory negligence. All I need say about the latter plea is that the jury very properly negatived any foundation for it.

The facts of the case are these. The plaintiff and the defendants are next door neighbours. The plaintiff and the defendant Peter O'Gorman are both small farmers in the county Clare, and for several years before the 20th September, 1900, the latter had collected, in a little field or garden on his own farm, but adjoining the plaintiff's house, a large number of beehives. The original number of hives was one, or two. The number then went up to six, and at the time that this unfortunate occurrence took place, on the 20th September, 1900, there were either twenty or twenty-two hives in this little

garden. There was evidence that at various times, during the previous five years, complaints had been made of the bees having attacked men who were working on the plaintiff's farm. Even on the 20th September, 1900, a complaint was made in the earlier part of the day. Later on, the plaintiff was harnessing a horse in front of his own door. About four or five yards off was a little low fence of stone. While harnessing the horse the bees came across from the defendant's land and attacked both man and horse. It is not a question of an individual bee, or two or three bees. They must have come across in considerable numbers. The plaintiff was stung and the horse was frightened. The plaintiff had put the winkers on the horse, and just as he was putting on the collar the animal bolted, while the plaintiff held on to his head, or to some part of his body. The horse forced the plaintiff up against the stone fence and thus caused the injury to his spine, to which he ultimately succumbed. These incidents occurred almost in the space of a minute.

At the close of the case, the learned Judge, having refused a direction, left the following questions to the jury, all of which were found in favour of the plaintiff—[His Lordship here read the questions and answers].

It would appear from the Judge's report that in connection with answer No. 5, with reference to the reasonable user of the land, the jury in reply to an interrogatory addressed to them stated that what they meant was that the bees were kept in unreasonable numbers, AND at an unreasonable place, *and* with appreciable danger to the inhabitants of plaintiff's farm.

The only questions that were argued before us were as to the reasonable user of the defendant's lands, and the remoteness of damage. It was conceded that bees were not *ferœ naturæ*, that the plaintiff's injuries were caused by his being forced up against the fence, and that the two defendants were to be regarded as owners of both the land and the bees. On the two questions submitted to us, we think that there was evidence fit to be submitted to the jury that the bees were kept in unreasonable numbers, and at an unreasonable place, and with appreciable danger to the occupiers of the plaintiff's farm, and, further, that the honey was not taken on the 20th September with reasonable

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care, skill, and prudence, and that the damages were not too remote. As to the first, it appears, as I have already said, that there had been complaints anterior to the 20th September, 1900. The complaints do not appear to have been frequent, but there was evidence that on occasions the plaintiff's men had to discontinue their work in the day time and come again in the evening when the bees had retired to their hives. On the morning of the 20th September complaints were made. The bees were all in the immediate vicinity of the plaintiff's house. The defendant Michael O'Gorman, who took the honey from the hives on that particular occasion, was armed *cap a pie*, and not only with offensive weapons, but with defensive armour. So far as he was concerned, not a single bee could do *him* the slightest harm. He proceeded to take the honey from one out of the twenty-two hives, all collected together in the same small enclosure. It might well be that the attempted destruction of one hive immediately adjacent to a number of others would have an irritating effect upon the occupants of the latter, and such a circumstance would be a material one for the jury in determining whether there had been want of care in taking the honey. But on the other issue as to the bees being kept in an unreasonable number or at an unreasonable place, or with appreciable danger to the inhabitants of the adjoining farm, there was evidence that the bees were kept within a few yards of the front of the plaintiff's dwelling-house, and in considerable numbers. It is not a question of one hive, or two, or three, but it is a question of at least twenty hives, kept in a small space in the immediate vicinity of the plaintiff's house.

I do not see how that evidence could have been withheld from the jury. The defendants were entitled to the natural and reasonable use of their own land, and the jury had to consider whether this keeping of bees in the manner and place in which they did, went beyond the lawful user of their own land in relation to their neighbour. It was a jury question, and there was, in my opinion, evidence upon which they could properly act. They found in effect that the defendant had set up what was an actionable nuisance, and that it resulted in injury to his neighbour. I do not think that that finding can be quarrelled

with, and my opinion is supported by the dictum of Pollock, B., in *Farrer* v. *Nelson* (1), in which I concur. I therefore hold that the action lies.

As to remoteness of damage, I am of opinion that on this point also there is no reason for disturbing the verdict. The £200 have been awarded, not alone in respect of the injury which was caused to the plaintiff's spine, but also in respect of what he suffered directly from the stings of the bees. But assuming, as I think we reasonably may, that the greater portion of the sum has relation to the former, I do not think that the damage is too remote. The horse and man were both stung; the man was at the horse's head when the latter bolted up against the wall, crushing him against it. The whole occurrence was the work of a moment. The injury to the spine was not an incident that took place after an interval of time, but connected with and immediately following on the direct cause. Indeed the circumstances may be said to have been almost simultaneous.

The verdict and judgment for the plaintiff will therefore stand.

BARTON, J.:—

I have also come to the conclusion that this verdict ought not to be disturbed, but not without considerable hesitation. In the first place I do not think that the verdict can be supported by reference to the doctrine of "scienter," or "notice of mischievous propensities" of animals; or by reference to those cases in which defendants have been held liable for the "escape of animals" from their premises and control. These topics were adverted to in the course of the argument, but I hardly think that they were seriously pressed. In the next place, I doubt whether the verdict can be supported upon the ground of damage caused by nuisance or unreasonable user of land, or by reference to *Farrer* v. *Nelson* (1). That was a case of injury to crops from overstocking land with game—a user of land which was calculated to injure, and did injure, the crops. This is an action for personal injuries to a man, caused by a horse, which he was harnessing,

(1) 15 Q. B. D 258.

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being suddenly stung by bees. Mr. Barry argued that there was no evidence that the mere number and location of these hives was calculated to cause bees to sting the horse, or did cause the horse to be stung. Mr. Barry pointed out that plaintiff's injuries were caused by the use of the "smoker," which is an ordinary instrument of bee-keeping, always attended by some risk to persons in the immediate neighbourhood. That risk might be increased by the multiplication of hives; but he contended that the plaintiff's injuries were, upon the admitted facts of the case, really attributable, not to a nuisance or to unreasonable user of land, but to a particular act done on a particular occasion, namely, the smoking of the hives with this "smoker" when plaintiff happened to be near the hives.

If that be the true view ot the case, it would seem to me that, if this verdict can be supported, it must be by reference to the facts and findings of the jury as to negligence. It is conceded that it was the defendant's operations with the "smoker" that caused the bees to sting the horse, and it cannot be doubted that a word of warning would have avoided all the harm. This is not denied, but defendant's counsel say that there was no duty and no liability, and that it was all a mere "accident upon an accident." Accordingly, we are met at the threshold of this branch of the case by the question—Was any duty—such as our law will recognise—owed by defendant to plaintiff to warn him or otherwise take care while smoking these hives? In other words, Do the facts of this case bring it within those limited classes of case in which, in the absence of any contractual relation between the parties, a duty to be careful may be owed by one person to another? Upon this subject reference may be usefully made to some passages in the judgments delivered in the Court of Appeal in England in *Le Lievre* v. *Gould* (1). In that case Bowen, L.J., quoted with approval the judgment of Romer, J., in *Scholes* v. *Brook* (2), in which that learned Judge divided the cases, in which a duty to take care may arise apart from contract, into two classes, viz., those falling under the doctrine of "invitation to premises," and those arising out of the careless using, managing, or dealing

(1) [1893] 1 Q. B. 491. (2) 63 L. T. (N. S.) 837.

with dangerous instruments or things. With reference to the latter class, Bowen, L.J., said, at p. 502:—"Take, for example, the case of the owner of a chattel, such as a horse, a gun, or a carriage, *or any other instrument*, which is in itself of such a character that, if it be used carelessly, it may injure some third person who is near to it, then it is as plain as daylight that the owner of that chattel, who is responsible for its management, is bound to be careful how he uses it." Lord Esher, M.R., at p. 497, said:—"If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." A. L. Smith, L.J., at p. 504, adopted the rule that "a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." These are *dicta* of high authority; and it becomes necessary to consider whether they have not some application to the facts of the present case.

This case certainly cannot be represented as a mere case of a man who has been injured in consequence of a sting from a neighbour's bee. If that was all, there could be no duty and no liability. The facts of the case are special and unusual, and Mr. Bushe argued that there was evidence that defendant, when proceeding to smoke these hives, knew, or ought to have known, that his neighbour was likely to be at that very time—as in fact he was—in immediate proximity to the hives tackling his horse. Plaintiff's witnesses gave evidence to that effect, and defendant made significant admissions in the same direction. It was proved that this was the usual time for plaintiff to come to this spot for the purpose of tackling his horse, and defendant's knowledge that the horse was at this spot close to the hives at the time, and that it was plaintiff's habit to tackle there, was admitted. For example, I find that defendant said in cross-examination—"I saw the horse in the yard feeding there and before. They were in the habit of bringing the horse there at dinner time, and to tackle there." It was also pointed out that it appeared from his admissions in cross-examination that he was a farmer and bee-keeper acquainted with the ways of bees and of

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horses, and with the serious consequences of bees stinging horses. Apparently it was on account of risks and inconveniences of that kind that he located his twenty-two hives at some distance from his own stables and yard. It had been brought definitely to defendant's notice by complaints that his neighbours had been forced, on account of the bees, to cease working on several occasions in the neighbourhood of the hives. Risk of injury from smoking the hives might be increased by the collection of so many hives in a small space. It is clear that defendant knew that the operation of applying the "smoker" to the hives was attended by some danger of physical injury to any person in the immediate neighbourhood. The best possible evidence of this was afforded by the ample precautions which he thought it prudent to adopt for his own safety. He wore a crape veil. His hands were covered, and he was enveloped in a cloak. As he said, "I had a proper dress on." Mr. Bourke truly said that this is a usual precaution for a bee-keeper to adopt when smoking hives. That is so ; but it only shows that a "smoker" is an instrument which, when applied to beehives, is, to apply Bowen, L.J.'s *dictum*, of such a character that it may cause injury to a person who is near, unless some precaution be taken.

Under these circumstances, was it unreasonable or contrary to law for the jury to come to the conclusion that there was—having regard especially to the knowledge which he possessed of the likelihood that plaintiff would be harnessing his horse in immediate proximity to the hives, and to the precautions which he adopted for his own safety—some duty cast upon defendant towards his neighbour to warn him or take some other precaution? Mr. Barry truly said that bee-keeping is an ancient and useful industry. But if the handling of an instrument or the carrying out of an operation connected with an industry, however ancient and useful, is, under special circumstances, such as were given in evidence and found by the jury in this case, attended by danger of physical injury to a person in the immediate neighbourhood, and if the person using the instrument or carrying out the operation has or ought to have knowledge of that danger to that person—in such a case may not a duty arise towards that person to take care, the breach of which may result in actionable negligence? Would not

a duty to take care arise in the case of a man blasting rocks or felling trees at his boundary fence with knowledge that within the ambit of the fall of rocks or trees it might reasonably be anticipated that his neighbour would be tackling his horse? Cases of that kind may differ from the present case in degree of danger and of gravity; but in principle is there not a resemblance?

It has not been brought to our notice that there was any misdirection by the learned Judge at the trial on the subject of remoteness of damage. If it be the correct view of this case that the jury were entitled to say that defendant ought to have anticipated risk of the kind of harm which happened to plaintiff, and ought to have warned him or taken some other precaution on his account, then it can hardly be disputed that all that befell plaintiff flowed naturally from the negligence of defendant. It is a case in which effect followed cause with great rapidity—in fact almost instantaneously. There was no intervening act of any third party. The tripping in the reins was caused by the horse turning when stung. The holding to the reins was not an unreasonable thing for plaintiff to do in the peril which defendant's negligence had placed him. Defendant's counsel seemed to me, upon the question of remoteness of damage, to be driven to contend that, even if it be conceded that there was evidence of an act negligently performed and of damage flowing directly therefrom, the defendant ought not to be held responsible for consequences so much greater than could have been reasonably anticipated by him. But, as Blackburn, J., said in *Smith* v. *London and South-Western Railway Company* (1), "What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." Once negligence is established, it is no answer that the damage, if it followed in the natural course of things, was more serious than was or might have been expected. Much mischief may flow, in a few seconds of time, as the natural consequence of a comparatively trivial form of negligence.

The case is, in my opinion, by no means free from difficulty,

(1) L. R. 6 C. P. 14, at p. 21.

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and I have arrived at the conclusion that the verdict ought not to be disturbed after much hesitation. My doubt, in the course of the argument, has specially had reference to the question whether the danger of the kind of harm which happened to plaintiff was sufficiently obvious to be such a danger as defendant could be legally bound to observe and avoid. But, on the whole, I do not feel disposed to dissent from the view that there was evidence for the jury upon the subject. If that be so, it would be an invasion of their province to interfere with their verdict. I have also felt hesitation because, in one respect, the case is a novel one from the point of view of legal liability. I am not aware of any other case in which liability for personal injuries caused by a frightened horse has been maintained where the cause of the horse's fright was stinging by bees. But in cases of high authority defendants have been held liable for personal injuries inflicted on a plaintiff by a horse frightened by some unexpected impact, or sight, or noise, the result of nuisance or of negligence. It is difficult to imagine anything more calculated to terrify a horse, and to result in injury to a man engaged in harnessing the horse, than sudden stinging by bees. If terror of that kind, followed by injury to plaintiff, is directly traceable to the negligent act of a defendant, why should he escape liability?

For these reasons I do not feel prepared to say that the jury could not reasonably come to the conclusion that the plaintiff's injuries were directly attributable to the defendant's negligence.

WRIGHT, J., concurred, holding that the doctrine of *scienter* did not apply, and that the case was disposed of by the findings of the jury, more particularly by their answer to the fifth question submitted to them.

Solicitor for the plaintiff: *F. F. Cullinan.*
Solicitor for the defendants: *James B. Molony.*

J. L.

CULLIMORE *v.* SAVAGE SOUTH AFRICA CO. (1).

(1901. No. 10,510.)

K. B. Div. 1902. Nov. 28. Dec. 16. 1903. Jan. 16. *Appeal.* Feb. 16, 17. March 12.

Master and servant—Scope of employment—Assault—False imprisonment—Practice—Parties—Suing a fancy name—Appearance by partner to writ issued against firm—Depriving successful party of costs—Rules of 1891, *Orders IX., R.* 9; *XII., R.* 9; *XVI., R.* 14; *XLII., R.* 10.

An incorporated Company, called "Shows, Limited," were proprietors of a public entertainment known as "Savage South Africa," of which F. and H. were advertised as managing directors. H. was managing director of Shows, Limited, and F. a paid servant of that Company. The plaintiff went to see the entertainment, and took a ticket at the door, paying D., the ticket-issuer, a sovereign, and receiving change. About half an hour afterwards D., who was responsible for the money taken, discovered that his cash was half-a-sovereign short, and believing that he had given plaintiff half-a-sovereign too much, he went to him and asked for the half-sovereign, and getting no satisfaction, brought the police, by whom plaintiff was for a time detained in custody. The manager of the entertainment was on the premises on the occasion, as also was F., but neither of them directed or sanctioned the arrest. The plaintiff issued a writ, claiming damages for assault and false imprisonment, naming as defendants "Savage South Africa Co." There was no such Company in existence. The writ was served on F., the indorsement of service stating that he was served as manager to Savage South Africa Co. F. and H. entered appearances in their own names, requiring a statement of claim. The appearances were entered before the coming into operation of the Rules of 1902. A statement of claim was delivered, which alleged that the defendants were the proprietors and managers of the Company known as Savage South Africa. Interlocutory judgment was marked in default of defence. F. and H. applied to have the judgment set aside on the ground of their absence from Ireland and of surprise, and it was set aside on the terms of their paying plaintiff's costs, and giving security for costs and damages to the amount of £50. On the motion an affidavit had been filed on behalf of F. and H., stating that F. was a paid servant and H. a shareholder and director of Shows, Limited, and that there was no such Company as Savage South Africa. A defence was delivered by F. and H., denying that "the defendants" were proprietors or managers of the Company known as Savage South Africa, and denying that D. was the servant of the defendants, and denying that the acts complained of were done in the scope of D.'s employment or by the defendants' authority:—

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

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Held, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; *diss.* Andrews, J.) and by the Court of Appeal, that D. had no implied authority to have the plaintiff arrested, and that judgment should be entered for the defendants; but *held*, by Lord O'Brien, L.C.J., *diss.* Gibson, J., that having regard to the nature of the statement of defence delivered by F. and H., they should be deprived of the costs of the action and the argument in the King's Bench Division.

Held, by Lord O'Brien, L.C.J., that F. and H. were entitled to have the action dismissed as against them on the further ground that they were not proprietors of a Company known as Savage South Africa.

Held, by Andrews, J., that D. had implied authority to have the plaintiff arrested; that it was not open to F. and H. to make the case that they were not partners in a firm styled Savage South Africa Co., and that the plaintiff was entitled to sustain a verdict for damages against Savage South Africa Co.

Held, by the Court of Appeal, that there were no grounds for exempting the plaintiff from costs.

Held, by Fitz Gibbon, L.J., that assuming the plaintiff to have a cause of action, he was warranted by Order XVI., Rule 14, in naming "Savage South Africa Co." as defendants; that service upon F. was good service upon the partners (if any) carrying on the exhibition; but that unless the point was waived, F. was not, by entering an appearance, precluded from denying that he was a partner; that such a defence was not, however, open to H. after he entered an appearance, and thereby admitted service.

THIS was an action brought to recover damages for assault and battery, false imprisonment, malicious arrest, and malicious prosecution. A joint stock Company called "Shows, Limited," were the proprietors of a public entertainment given in Dublin known as "Savage South Africa." Two persons named Frank E. Fillis and John Pitt Hardacre were advertised as managing directors of this entertainment. Hardacre was managing director of Shows, Limited, and Fillis was a paid servant of that Company. The grievances complained of were alleged to have been committed by a servant of the defendants named Henry Davis, who was a cellarman engaged at 30*s.* a week by the persons who had the refreshment department, but was occasionally employed as a ticket-taker. In the month of August, 1901, the plaintiff, accompanied by a friend, went to see one of the performances of Savage South Africa. At the ticket office he asked Davis, who was on that night acting as ticket-issuer and money-taker, for two 2*s.* tickets, and got them. He gave a sovereign in payment, and received in change a half-sovereign and six shillings in

silver. He and his friend then went to their seats. According to Davis, a dispute arose between himself and the plaintiff at the time of giving the change, as to whether plaintiff was not given two half-sovereigns; Davis's evidence being that he gave plaintiff a half-sovereign with the tickets, and then turned to where he kept the silver to get the 6*s*.; that when giving plaintiff the 6*s*. he said, "I have given you the 10*s*."; that plaintiff said, "Yes"; his friend said, "You have not," and plaintiff then said he had not got it; that he (Davis) did not dispute, as there were a lot of people waiting to come in, and he gave plaintiff another half-sovereign. About ten minutes or a quarter of an hour afterwards, according to Davis's evidence, Davis, who had been busy in the meantime issuing tickets, discovered that his cash was short by 10*s*., and believing that he had given the plaintiff a half-sovereign in excess of his change, he sent for a person named Montefiore (who was the manager of the entertainment, and was paid by Shows, Limited, and paid the servants, including Davis, at Savage South Africa, as treasurer), and asked him to stay in the ticket office, as he had given a gentleman 10*s*. too much. Montefiore took charge of the ticket office. His evidence was that Davis said "a mistake had occurred over a half-sovereign, and would I object to his going and endeavouring if possible to regain it by asking them to count their change." Davis then went in search of the plaintiff. He found the plaintiff and his friend watching the performance, and Davis's evidence was that he asked the plaintiff was not he the gentleman he gave the extra half-sovereign to, and that he requested him to look through his change, but that the plaintiff took no notice. The plaintiff, in his account of what took place, stated that in reply to questions put to him by Davis he admitted that he was the person who had changed a sovereign, but denied that he had received a half-sovereign too much, and that Davis went away saying he would make plaintiff give up the half-sovereign. This, according to plaintiff's evidence, took place about twenty-five minutes after he had taken his seat. Davis then applied to a police constable, and afterwards to an inspector. The plaintiff's account of what took place was that Davis came up with the constable, who demanded plaintiff's name and address, and said to him, "You 're charged with conspiracy to defraud the Company," and noticed

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him to give back the half-sovereign; that plaintiff denied having received a half-sovereign too much, and stated he had only one in his pocket; that the constable then went away, and came back with the inspector, who asked plaintiff to refund the half-sovereign, or he would be obliged to take him to the police-station and have him searched; that plaintiff again denied having a second half-sovereign, whereupon the constable, at a sign from the inspector, took plaintiff by the arm, and marched him to the exit, a distance of 30 or 40 yards. The inspector and constable denied that any arrest took place. Their evidence was that, at the suggestion of Davis, they merely asked plaintiff to count his change, and on his stating he had not got a half-sovereign too much, asked him to accompany them to the manager, which he did, he and his friend walking on in front. On reaching the exit Davis called Montefiore out of the ticket office and told him he could not get his half-sovereign. Montefiore replied, "If you can't make any good of it you must stand by it," and he told the inspector he would have nothing more about it. Plaintiff and his friend were then ordered out of the show by the inspector, and went out. Davis was responsible for the money taken at the door, and there was no allowance for shortage. He stated in his evidence that he did not put down the plaintiff's action as a fraud, that he was thinking of his week's wages—he wanted to send some home to his wife. He went on to say, "I did not look at it in the light of the Company. I was looking for my half-sovereign. My half-sovereign was troubling me." He was afterwards compelled to refund the half-sovereign, the amount being deducted out of his wages by Montefiore subsequently to the bringing of the action. Fillis was in the ring when the occurrence took place.

The writ of summons was issued on the 3rd September, 1901, "Savage South Africa Co." being named as defendants; it was served, as appeared by the indorsement of service, on Fillis "as manager to Savage South Africa Co.," and the affidavit of service described Fillis as director of Savage South Africa Co. Hardacre was not served with the writ. Both Fillis and Hardacre entered appearances on the 18th September, 1901, in their own names, requiring a statement of claim. A statement of claim was delivered on the 22nd February, 1902, the first paragraph of which alleged that "The defendants are the proprietors and

managers of the Company known as Savage South Africa." The statement of claim then alleged in various paragraphs that the defendants by their servant assaulted and beat the plaintiff, and maliciously and without reasonable or probable cause preferred a charge against him of obtaining money under false pretences, and of defrauding defendants, and of conspiring to defraud them, and caused plaintiff to be arrested and taken into custody. No defence having been delivered within the time limited, the plaintiff obtained interlocutory judgment, which was duly entered against "Savage South Africa Co." Fillis and Hardacre applied to the Court as defendants to have this judgment set aside on the terms of paying the plaintiff's costs, on the ground of their absence from Ireland and inability to give instructions, and on the ground of surprise. For the purpose of the motion an affidavit was made by Montefiore, stating that "Shows, Limited," was a Company incorporated under the Companies Acts, and the owner of the Show known as Savage South Africa; that Fillis was simply a paid servant, and Hardacre a shareholder and managing director of Shows, Limited; and that there was no such Company in existence as "Savage South Africa Co." An order was made that upon the defendants paying the plaintiff's costs as therein mentioned, and giving security measured at £50 for costs and damages in the action, the judgment should be set aside, and the defendants be at liberty to defend the action. Fillis and Hardacre complied with this order, and lodged the £50, and on the 18th April, 1902, delivered a statement of defence, which was stated on its face to be "statement of defence of J. Pitt Hardacre and Frank E. Fillis." The first paragraph stated that "The defendants deny that they are proprietors or managers of the Company known as Savage South Africa." They also traversed the several allegations in the statement of claim, denied that the person by whom the acts complained of were alleged to have been committed was the servant of the defendants or either of them, and as a further defence alleged that the person referred to in the statement of claim as the defendants' servant was employed by the defendants as a money-taker at an entertainment known as Savage South Africa on behalf of the defendants, who were interested in the said undertaking, and not otherwise, and that the acts complained of were not done by him

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in the course of his employment, and were not within the scope of such employment, and were wholly unauthorised by the defendants or either of them.

The action was tried before Mr. Justice Barton, with a common jury of the city of Dublin. At the close of the plaintiff's case the defendants' counsel asked for a direction on the ground that Savage South Africa was not a limited, Company and on the ground that there was no evidence to make the employers liable for the clerk's action, that defendants might withdraw their licence to plaintiff at any time and turn him out, and that there was no evidence of malicious prosecution. Mr. Justice Barton ruled that there was no evidence of malicious prosecution, but declined to give any other ruling at that stage.

At the close of the case the following questions were submitted to the jury:—1. Was Davis on the occasion in question in the employment of a commercial enterprise carrying on its business under the trade name of Savage South Africa? *Answer*—Yes. 2. Did Davis on the occasion in question cause plaintiff to be detained against his will by the police? *Answer*—Yes. 3. In doing so was he endeavouring to regain and recover for his employers his employers' property? *Answer*—Yes. 4. In doing so did he believe that plaintiff was retaining and refusing to give up money of his employers, knowing it to be so, and intending to appropriate it? *Answer*—Yes. 5. Was Davis in doing so acting within the scope of his authority? *Answer*—Yes. 6. Were Fillis and Hardacre or either of them proprietors of Savage South Africa? *No answer.* 7. Did Fillis and Hardacre hold themselves out to plaintiff and others as the persons responsible for the direction and management of Savage South Africa in Dublin? *Answer*—Yes. 8. To what damages, if any, is plaintiff entitled? *Answer*—£35. Question No. 6 was left to the jury at the request of defendants' counsel, who asked the Judge to direct the jury that Fillis and Hardacre were not proprietors of Savage South Africa. The jury considered—and, in the opinion of Mr. Justice Barton, rightly—that they had no evidence, one way or another, upon the question.

Mr. Justice Barton abstained from giving judgment on the ground that he had a difficulty in seeing that there was any person or persons on the record legally responsible for the acts of

Davis, Savage South Africa not being a limited Company, and Hardacre and Fillis not being proprietors of the Show. He reserved liberty to either party to move for judgment.

Notice of motion was now served on behalf of Fillis and Hardacre for an order that judgment should be entered for them dismissing the action with costs, and that the verdict for £35 should be set aside on the ground of non-direction and mis-direction, and on the further ground that there was no evidence to support the finding of the jury, or in the alternative that a new trial should be granted to Fillis and Hardacre on the ground that the findings were against evidence and the weight of evidence, and were perverse, and also on the ground that the learned Judge should have directed a verdict for Fillis and Hardacre, and on the ground of the reception of illegal evidence.

Notice of motion was also served on behalf of the plaintiff for an order that judgment should be entered for the plaintiff for £35 damages, with costs of the action and motion.

Fitz Henry (with him *Healy, K.C.*), for the plaintiff.

W. G. Jefferson and *Gaussen*, for Fillis and Hardacre.

The following authorities were cited :—As to whether Davis was acting within the scope of his employment: *Hanson* v. *Waller* (1); *Jones* v. *Duck* (2); *Bank of New South Wales* v. *Owston* (3); *Abrahams* v. *Deakin* (4); *Stedman* v. *Baker* (5); *Van Den Eynde* v. *Ulster Railway Co.* (6); *Blades* v. *Higgs* (7); *Limpus* v. *London General Omnibus Co.* (8); *Poulton* v. *London & S.-W. Railway Co.* (9); *Bayley* v. *Manchester, Sheffield, & Lincolnshire Railway Co.* (10); *Allen* v. *London & S.-W. Railway Co.* (11). As to suing a firm: *Munster* v. *Railton* (12); and appearance by party who wishes to deny that he is a partner: *Davies* v. *André* (13). As to the effect of a party representing himself to be a partner: *Waugh* v. *Carver* (14); 1 Smith's L. C. (7th ed.), p. 922.

Cur. adv. vult.

(1) [1901] 1 K. B. 390.
(2) *The Times*, March 16, 1900.
(3) 4 A. C. 270.
(4) [1891] 1 Q. B. 516.
(5) 12 *Times* L. R. 451.
(6) I. R. 5 C. L. 6, 328. [Cas. 621.
(7) 12 C. B. (N. S.) 844; 11 H. L.
(8) 1 H. & C. 526.
(9) L. R. 2 Q. B. 534.
(10) L. R. 7 C. P. 415; 8 C. P. 148.
(11) L. R. 6 Q. B. 65.
(12) 11 Q. B. D. 435; 10 A. C. 680.
(13) 24 Q. B. D. 598.
(14) 2 H. Bl. 235.

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Jan. 16.

ANDREWS, J.:—

The plaintiff's claim in this action, as indorsed on the writ of summons, was for damages for assault and battery, false imprisonment, malicious arrest, and malicious prosecution. The grievances complained of were alleged to have been committed by a servant of the defendants named Harry Davis, who was the ticket-issuer and money-taker at an entertainment given in Dublin called Savage South Africa. It appears from the evidence that Davis believed he had given the plaintiff a half-sovereign in excess of his proper change when the plaintiff was paying for his entrance ticket and that of a friend; that Davis was busy issuing tickets, both then and for about half an hour afterwards, and that as soon as he had time he asked a person named Montefiore, who was there as a manager of the Show, to take his place, and then went to the plaintiff and asked for the half-sovereign, and getting no satisfaction he brought a policeman. There was evidence to sustain the plaintiff's complaint that he was arrested and detained by the policeman, at the instance of Davis, on the charge of knowingly appropriating a half-sovereign received by him in excess of his proper change, which, after some discussion, however, was not persisted in, and the plaintiff was liberated but not exculpated, and was expelled from the place of entertainment. The evidence has been so fully discussed already that I need not do more than refer to the learned Judge's report for the details.

The defendants were sued as a partnership under the style of Savage South Africa Company, a name which partners might, if they pleased, adopt as the name of their firm, and two persons named Fillis and Hardacre were, in advertisements published in Dublin, announced to be "Managing Directors" of the entertainment. The writ, as appears by the indorsement thereon, was served on Fillis as "Manager to Savage South Africa Co." The affidavit of service described him as "Director of Savage South Africa Co.," and in my opinion the service upon him was, under Order IX., Rule 9, not as a partner, but as a person having the management of the partnership business in Dublin. Hardacre was not served with the writ. When a firm is served with a writ, either by service on a partner or on the manager of the partnership business, the appearance must be by

the partners individually, in their own names, pursuant to Order XII., Rule 9. A person not served as a partner, and who is not a partner, need not appear, and ought not to do so, and no personal liability results to him from his non-appearance. He is served simply as a person through whom the firm is to be deemed to be served. It is only a partner who has a right to appear, and he must appear in his own name, and a person so appearing admits that he is a partner, and is bound by the admission: *Davies* v. *André* (1). It was competent to Fillis before he appeared to have ascertained by reference to the indorsement on the writ, if he was not otherwise informed of it, in what capacity he was served—not having been served as a partner he could not have been made liable under a judgment against the firm unless he was a partner: Order XLII., Rule 10. The difficulty which he might have been in, as the rules then stood, if he had been served as a partner, did not exist in his case. After the service on Fillis both he and Hardacre entered appearances in their own names as defendants, and thereby admitted that they were partners in a firm styled "Savage South Africa Company," and as such defendants they required the delivery of a statement of claim, which was delivered accordingly. The statement in the first paragraph thereof, that the "defendants" were the proprietors and managers of the Company known as Savage South Africa, obviously referred to the Company so described in the writ, and not to Fillis and Hardacre individually. The plaintiff in due course regularly obtained an interlocutory judgment by default for want of a defence, which was properly entered, pursuant to the writ, against "Savage South Africa Company." Fillis and Hardacre, who had appeared, apparently recognising that under this judgment they could be made liable as partners, did not seek to be relieved from having appeared through any mistake, but applied to the Court, as defendants, to set aside the judgment, on the terms of paying the plaintiff's costs, and on the grounds of their absence from Ireland and consequent inability to give instructions, and that the judgment was entered by surprise; and upon the 26th of

(1) 24 Q. B. D. 598.

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March, 1902, they obtained an order that upon their paying the plaintiff's costs, as therein mentioned, and giving security measured at £50 for costs and damages in the action, the judgment should be set aside, and that the defendants should be at liberty to defend the action. They complied with this order, and lodged the £50 in Court, and took defence to the whole action as the defendants therein. In the first paragraph of their defence, which was stated on the face of it to be the "defence of J. Pitt Hardacre and Francis E. Fillis," they denied that *they* were "the proprietors or managers of the Company known as Savage South Africa." They could not thus get rid of their admission that they were partners or take defence in any other capacity, and this statement in their defence was simply either immaterial or inadmissible. The statement of claim did not aver that Fillis and Hardacre were such proprietors and managers. The averment in it merely was that the defendants in the writ (Savage South Africa Company) were such proprietors and managers. Fillis and Hardacre not only admitted by their appearance that they were partners in Savage South Africa Company, but obtained the order I have referred to, and got leave to defend as the defendants, and lodged £50 as security for the plaintiff's costs and damages. By their defence they also traversed all the material allegations in the statement of claim, and as a further defence (paragraph 9) averred that the person referred to in the statement of claim as the defendants' servant (*i.e.*, Davis) was employed by the defendants to act as money-taker at the entertainment for and on behalf of the defendants, who were interested in the said undertaking, and not otherwise, and that the acts complained of were not done by him within the scope of his employment. The jury found (1) that Davis was in the employment of a commercial enterprise, trading as Savage South Africa; (2) that Davis caused the plaintiff to be detained against his will by the police; (3) that in doing so he was endeavouring to regain and recover for his employers his employers' property; (4) that in doing so he believed that the plaintiff was retaining and refusing to give up money of his employers, knowing it to be so, and intending to appropriate it; (5) that in doing so he was acting within the scope of his authority; and that Fillis and Hardacre held themselves out as the persons

responsible for the direction and management of Savage South Africa in Dublin; and they assessed the plaintiff's damages at £35. I think there was sufficient evidence to sustain the findings of the jury. They had not evidence to enable them to answer, and did not answer, a question put to them at the defendants' request, viz., whether Fillis and Hardacre or either of them were proprietors of Savage South Africa? I think, as I have already indicated, that this question was either inadmissible or immaterial, for having regard to their appearance and proceedings throughout the action, it was not, in my opinion, open to Fillis and Hardacre to allege that they were not partners in a firm styled Savage South Africa Company. They had, as I have already said, no right to appear and defend in any other capacity, and if they were not partners and had not appeared a judgment against Savage South Africa Company would not have made them liable thereunder. It was alleged in the evidence at the trial that there was no such company as Savage South Africa Company, and that it was an entertainment "run" by a limited liability Company called "Shows, Limited." Whether this was so or not, I am of opinion that it was not open to Fillis and Hardacre to make such a case. If, although connected, as was alleged, with "Shows, Limited," they chose to "run" a Show under the name of Savage South Africa Company, and hold themselves out as the persons who were doing so, they could render themselves liable accordingly, but their only *locus standi* in appearing and defending the action was that they were partners in a firm styled Savage South Africa Company, and in my opinion they cannot now, after accepting that position by their appearance, and getting leave to set aside the interlocutory judgment and defend the action on the faith of it, be allowed to deny that they occupied it. Whatever Savage South Africa Company was, it appears that it has "burst up," and such effects as may have belonged to it have disappeared from Ireland, and there is nothing now to satisfy the plaintiff's damages and costs except the £50 lodged in Court, which presumably will be insufficient for the purpose.

The Judge at the trial having abstained from giving judgment, both parties moved for judgment, and in addition to what I have already referred to it was argued on behalf of the defen-

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dants, *i.e.*, Fillis and Hardacre, that upon the evidence it could not be held that the arrest of the plaintiff was within the scope of Davis's employment. This appeared to me to be the only real question which it was open to the defendants to raise. I do not regard it as material that Davis did not ask Montefiore for authority to have the plaintiff arrested, for Montefiore as manager could not have given him such authority. This, I think, is shown by the recent case of *Hanson* v. *Waller* (1). Davis's employers were not accessible to be consulted, and Davis's delay for about half an hour before going to the plaintiff is accounted for by his having been occupied in the discharge of his duty in issuing tickets in the meantime. What, then, was the authority which Davis impliedly had from his employers, for there was no evidence that he had any express authority to have the plaintiff arrested under the circumstances which he believed to exist? The law on this subject is laid down in many cases as settled. It appears to me that there was sufficient evidence to show that in having the plaintiff arrested Davis was doing what was reasonably necessary for what he believed to be the protection of his employers' property, of which he was in charge. In *Hanson* v. *Waller* (1), Kennedy, J., in giving judgment (page 393) said that each case must to a great extent depend on its own circumstances—that the law had nowhere been stated more clearly than in the case of *Jones* v. *Duck* (2), in which A. L. Smith, L.J., said that the cases showed that a servant had an implied authority to give a person into custody if it was necessary to do so in order to protect the master's property . . . . and that a servant might have such an implied authority derived from the exigency of a particular occasion; and that in the case of *The Bank of New South Wales* v. *Owston* (3) Sir Montague Smith in delivering the judgment of the Privy Council said that the result of the decisions in all these cases was that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot, though it was suggested that possibly a like authority might be implied (as I venture

(1) [1901] 1 Q. B. 390. (2) *Times*, Mar. 16, 1900, C. A. (3) 4 A. C. 270.

to think it well may be) in the supposed cases of a servant in charge of his master's property arresting a man who, he had reason to believe, was attempting to steal, or had actually stolen it. In the latter of these cases it was part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the *employer* before acting would be material circumstances to be considered in determining the question of authority. After referring to the cases of *Abrahams* v. *Deakin* (1) and *Stedman* v. *Baker* (2), in which the law was laid down in a similar manner, Kennedy, J., went on to say (in *Hanson* v. *Waller* (3)) that in *Jones* v. *Duck* (4) A. L. Smith, L.J., was of opinion that upon the decided cases a master would be liable for the act of his servant on the ground of implied authority if the giving into custody was an act necessary to protect the master's property. Darling, J., was of the same opinion, and the law so laid down, which is not new law, appears to me to be applicable to the present case, in which Davis as ticket-issuer and money-taker had charge of the money he received, which belonged to his employers, to whom he had no access at the time, and a portion of which he *bona fide* believed that the plaintiff had taken in his presence, and was knowingly retaining and refusing to give up, and which might be recovered by the arrest of the plaintiff, and might be lost by not arresting him. I refer to Davis's belief having been *bona fide* because there is no other reasonable explanation of his conduct, and his *bona fides* does not seem open to doubt.

In the earlier case in Ireland of *Van Den Eynde* v. *The Ulster Railway Company* (5) this law appears to be recognised in the learned and considered judgment of the late Chief Baron Pigot. Whatever difficulty may exist in cases of this character is not in determining what the law is, but in the proper application of it. The Chief Baron quoted with approval (p. 338) what was said by the then Mr. Justice Blackburn in his judgment in the case of *Poulton* v. *The London and South-Western Railway Company* (6) at p. 538, viz. :—"There can be no question since the decision of the case of

(1) [1891] 1 Q. B. 516.
(2) 12 *Times* L. R. 451.
(3) [1901] 1 Q. B. at p. 394.
(4) *Times*, Mar. 16, 1900, C. A.
(5) I. R. 5 C. L. 328.
(6) L. R. 2 Q. B. 534.

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Goff v. *The Great Northern Railway Company* (1) that where a railway company or any other body, for it does not matter whether it is a railway company or not, have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business, all such things as somebody must make up his mind, on behalf of the Company, whether they should be done or not; and the fact that the Company are absent, and the person is there to manage their affairs, is *prima facie* evidence that he was clothed with authority to do all that was right and proper, and if he happens to make a mistake, or commits an excess while acting within the scope of his authority, his employers are responsible." In the present case, on the assumption that the facts were as Davis believed, his employers could have lawfully done what he did. Davis believed that a half-sovereign of his employers' money, which he had given to the plaintiff by mistake in excess of his change, had been taken away by the plaintiff in the presence of Davis, and was retained by him, knowing that he had so received it. The Chief Baron at the close of the judgment in the Irish case I have referred to said (p. 348)—"I am of opinion that whether the detention of the plaintiff be considered as the result of an arrest for felonious taking, or as a detention for the purpose of regaining, after a search of the plaintiff, the ticket which the ticket clerk and the station-master believed he had taken, there was evidence that their object was to get back the property which was in the immediate charge of the ticket clerk, and was also under the general charge of the station-master; that in endeavouring to regain the property of their employers they acted within the scope of their employment; that the defendants are responsible for the acts so done; and that they are not exempted from responsibility by the fact that their officials made a mistake or committed an excess in what they did, incurring legal liability for what was so done"; and with reference to the suggestion that the ticket clerk had himself an interest in the recovery of the ticket supposed to have been illegally taken by the plaintiff, the Chief Baron said—"This appears to me to be

(1) 3 E. & E. 672.

perfectly immaterial. Whether the ticket clerk was or was not liable to account for the value of the ticket, it was part of his employment and his duty to protect the property of his employers."

I have not referred to these authorities as cases in point with the present case, which they are not, but as cases in which what has been treated as settled law is referred to and recognised, and I do not think it necessary to refer to further cases in which the same principles are to be found. The result, in my opinion, is that, subject as I shall mention, the defendants' motion should be refused, and that the plaintiff's motion should be granted to the extent of ordering judgment to be entered for him in this action against Savage South Africa Company on the cause of action in his statement of claim for assault and battery, which has been treated as including the false imprisonment, with £35 damages and costs, and that judgment should be entered for Savage South Africa Company on the remainder of the plaintiff's statement of claim, with such costs, if any, as that judgment will entitle them to, the amount thereof when taxed to be deducted from the amount of the plaintiff's costs allowed on taxation.

GIBSON, J. :—

In this tangled litigation, where everything that has been done has been wrong, the plaintiff contends that on the findings of the jury he is entitled to judgment against the defendants, the supposed Company, and that in such judgment no notice can be taken of Fillis and Hardacre, who by appearing have admitted that they were partners; and Fillis and Hardacre on the other hand contend that they are not by their appearance precluded from setting up the defence on which they always relied that they were not partners at all; and they also insist that even if there was a partnership, the defendants are not liable for plaintiff's arrest (if he was arrested, which they deny), as Davis exceeded his implied authority. There are thus two questions for decision—one of technicality, and one of substance.

1. The answer to the first and technical question depends partly (*a*) on the construction of our former pleading orders and rules, and partly (*b*) on the effect of the actual appearance and defence. These matters must be considered separately.

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A. Persons, or a single person, trading under a firm name may be sued in a firm name. "Persons" here mean natural persons, not artificial persons such as a limited company. Where the persons are sued as partners, service must be either upon one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service control or management of the partnership business there. There may be a question whether in the case of an English partnership Order XI. may not apply, Order XVI., Rule 14, not containing the words introduced in the corresponding English Rule; but this I do not pause to consider. The persons sued in the firm name must appear individually. Under Order XLII., Rule 10, where a judgment or order is against a firm execution may issue against anyone who has appeared in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, or against anyone who has been served as a partner with the writ and has failed to appear.

Under the above code of rules it has been held that a conditional appearance is incompetent. Does this mean that the appearance must operate as a conclusive and irrevocable admission of partnership? Take the following cases:—(1) A and B are sued as partners on a bill obtained by fraud, as to which there is a defence that the plaintiff is not holder in due course; B is not ostensible partner, but is sought to be made liable on some ground such as may be found in the authorities cited in the notes to *Waugh* v. *Carver* (1); B is served with the writ. (2) A and B are sued as partners in respect of transactions quite outside the partnership; A and B are partners in a different business, but A has used the firm name in the particular transaction for his own private trade without B's knowledge; B is served. Can the effect of the rules be that B, so served as partner, if he enters no appearance is liable to execution, and if he enters an appearance admits that he is partner? Such a result would be flagrantly absurd and unjust, and accordingly Lord Esher in *Davies* v. *André* (2) held that notwithstanding unconditional appearance the person served as partner could contest the action not merely

(1) 1 Smith, L. C. (9th ed.), 877. (2) 24 Q. B. D. 598.

on the merits, but on a denial of the partnership. Lord Esher seems to have thought that the difficulty from the uncertainty whether a person was partner or not was so rare that it might be disregarded. The notes to *Waugh* v. *Carver* (1) show that the difficulty whether a man is partner or not has been of frequent occurrence, and that there are few questions of law on which there has been a greater diversity of judicial opinion. In my opinion a person served as a partner can, with other defences, traverse that he is partner.

The question then arises, how is he to know in what character he is served? The rules do not provide for any communication to the person served defining the object and character of the service. The nature of the service cannot be determined by the process server's affidavit or his indorsement on the writ, matters which are not within the knowledge of the person served. In most cases the position occupied by the person served would probably exclude any controversy whether the service was on him as manager or as partner. But this is not necessarily so, and the mere act of service is ambiguous. The person served is at liberty, acting in good faith, to place his own construction on it; he is under no obligation to make inquiries from the plaintiff. If he enters an appearance as partner, when the service was only intended to be on him as manager, the plaintiff should at once so inform him and apply to set aside such appearance. If the plaintiff proceeds without objection he loses his right to complain of the delusive appearance (to use Bowen, L.J.'s phrase in *Munster* v. *Railton* (2)), and cannot set up the case that the service was only on the manager.

Next: assuming that in an action against defendants in a firm name a person is served as partner, have other persons intended to be affected by such service the same right of appearing, and then denying the partnership in their defence? I cannot discover any material difference, so far as the partnership rules are concerned, between a case where the firm name discloses the partner's name and a case where the firm name makes no such disclosure. In the latter case the plaintiff can compel the necessary information to

(1) 1 Smith, L. C. (9th ed.), 877. (2) 11 Q. B. D. at p. 439.

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be given. Where the partners are named in the firm description, why, it may be asked, should not the alleged partner who has not been served, but who is intended to be affected by such service, enjoy the same rights of defence as the person served? It is said that a person not served cannot be damnified by not appearing, if he is not in fact a partner. But if he cannot defend like the person served, he loses a valuable right, that of contesting the action which may be entirely fictitious. Why should the person served occupy a more advantageous position? Can the plaintiff by electing to sue defendants in a firm name and not as individuals impose on the alleged partners the onerous election of admitting partnership or forfeiting the right to defend? Does the construction of our former partnership rules fluctuate according as an alleged partner is served or not, so that in one case there may be a defence notwithstanding appearance, and in the other the appearance becomes a conclusive admission? The point is no doubt a difficult one. Taking it, however, that an appearance is inconsistent with a denial of partnership, where the defence, notwithstanding irregularity, raises that issue, and the plaintiff without objection goes to trial on it, he condones the irregularity and cannot treat the partnership issue as a nullity. This is, I think, certainly so in the case of Fillis, who was served, and may also be so in the case of Hardacre.

B. I have next to consider what has actually taken place and the position occupied by Fillis and Hardacre at the trial, on the above construction of the rules. The plaintiff's argument turned entirely on the effect of the appearance, which he construed as a conclusive admission of partnership, and the argument was not directed to the construction of the actual pleading. The name Savage South Africa was not necessarily a firm name, any more than the description "Belle of New York," "Gigas," "The Wild West," "Rosherville Gardens," or the "Foundling Hospital." The entertainment so described might be owned by an individual, by partners, or by a limited company. The writ treated the fancy description of the Show as a firm name, though, if Montefiore's evidence is true, the entertainment and business belonged to a limited company. There is no tangible evidence that there was any partnership, or who were partners. The writ was served on

Fillis only, who, with Hardacre, was described in the advertisement as "director." The process-server indorsed on the writ the service as on Fillis, as manager; but in his affidavit of service he described him as "director"—an ambiguous designation—the word "manager" being struck out. Whether Fillis could have been served as manager, having regard to his position and duties, may be doubtful. He and Hardacre entered appearances as if partners. On the motion to set aside the interlocutory judgment Montefiore's affidavit stated how Fillis and Hardacre stood in relation to the Show. It mentioned the limited company, and repudiated any partnership on behalf of Fillis and Hardacre. The £50 paid into Court as a condition to vacating the judgment was therefore accompanied with a denial (as plaintiff knew) that the two were partners. The question to be determined is whether, on the pleadings, Fillis and Hardacre raised an issue that they personally were not liable as partners, owners, or otherwise. The statement of claim, in paragraph 1, alleges that the defendants were proprietors and managers of the Company. The defendants were the Savage South Africa Company, and if they are sued in a firm name it was unnecessary to aver that they were proprietors and managers. The defence delivered by Hardacre and Fillis does not expressly purport to be on behalf of the Company. The first paragraph states that "the defendants" deny that they are the proprietors or managers of the Company known as Savage South Africa. What is the effect of the word "defendants" here? Does it mean the Company named as defendants, or the two individuals? Was the defence that of Fillis and Hardacre as individuals, or the defence of the Company? With some doubt I think that "defendants" in the claim and defence must be construed as referring to the Company. If so, Fillis and Hardacre were defending for, and in the name of, the Company; they had no separate *locus standi*, or right to have an issue determined whether they were partners or not. Their appearance was an admission of partnership, and the defence does not contradict that admission. What was the issue raised by this paragraph? In point of fact, there was apparently no partnership, but a limited company concealed behind the fancy name; it was not a firm name. Fillis and Hardacre cannot, however, raise this question, though the plaintiff

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might not be able to get any effective execution against the Company, save in respect of the money lodged in Court. The issue raised is, as to Fillis and Hardacre, meaningless. They cannot be heard to say that there was no partnership. The pleadings admit that the Company named as defendants was a legal entity, capable of delivering a defence. Supposing, however, that the defence did raise an issue of partnership with Fillis and Hardacre, I would think that after the plaintiff took issue and went to trial it would be too late to object that such issue was irregular. If, on such issue, it was found that Fillis and Hardacre were not partners, they would be entitled to judgment dismissing the action as against them with costs; and I doubt if the plaintiff could get judgment for damages and costs on the record against the Company, which, on that view, would not have been represented at the trial at all, Fillis and Hardacre being ascertained not to be partners, and being legally strangers to the concern.

As, however, the defence, on its true construction, raises no such issue, Fillis and Hardacre could only appear at the trial as representing the supposed Company or partnership, and not as individuals contesting their own personal liability. The trial was conducted on these lines.

2. The matter of substance raised in argument on behalf of the defendants is important, and is whether the acting ticket collector, under the circumstances as he supposed them to be, had implied authority, arising from his duty to protect and recover his employers' property, to arrest or detain the plaintiff, or whether he exceeded his powers in making such arrest. The case lies quite outside authorities relating to arrest for breach of bye-laws by a servant entrusted with the enforcement of such bye-laws, or cases where, as in *Limpus's Case* (1), the servant is put in the master's place *in his absence* to do a certain class of acts, and has to determine according to circumstances: *Bayley's Case* (2). It is not according to the usual course of a servant's duty to have a person arrested, though under special circumstances he may do so.

To what extent has a servant in charge of his master's

(1) 1 H. & C. 526. (2) L. R. 7 C. P. at p. 420.

property implied authority to arrest? In *Allen's Case* (1) Blackburn, J., put two supposed cases (as to which he did not pronounce any decided opinion)—one, where a servant in charge of a till found a man attempting to rob, and could not prevent him otherwise than by taking him into custody; the other, where the servant so in charge, believing that the money had been stolen, and that he could get it back by taking the thief into custody, took him into custody for that purpose. On these supposed cases no actual decision in England has been cited establishing the master's liability. I have no doubt that in principle there must be an implied authority to arrest in the first case; but the second case presents more difficulty, especially where, on the facts, there has been a lapse of time, and the criminal law is set in motion (as in *Owston's Case* (2), see p. 292) as a substitute for a civil remedy.

Lord Esher states, in *Abrahams* v. *Deakin* (3), there is no implied authority to take a man into custody for that which has been done. Implication of authority, as in many cases in our law (as, for example, that of a master of a vessel to sell a cargo: *Acatos* v. *Burns* (4)), depends on emergency requiring immediate action. The time, place, and opportunity of consulting the principal are material in determining the question: *Owston's Case* (2); *Hanson's Case* (5). Where the master or superior officer is at hand to give directions a subordinate servant cannot act on his own initiative; and where a substantial interval has elapsed there is usually no pressure of immediate necessity. Take the following case:—

The gardener of a gentleman who, or whose resident agent, is at home at the time, finds a person in the act of taking away peaches which were in the gardener's care, and for which he was accountable. He could seize the supposed offender there and then; but could he after the lapse of an interval pursue the supposed offender, and without his employer's knowledge or sanction give him into custody, and make his principal liable for his officious zeal, if a mistake was made? Or could a butler, on his own responsibility, set the criminal law in motion to recover

(1) L. R. 6 Q. B. 65.
(2) 4 A. C. 270.
(3) [1891] 1 Q. B. at p. 520.
(4) 3 Ex. D. 282.
(5) [1901] 1 K. B. 390.

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his master's wine, for which he, as butler, was accountable, when his master was there to give any directions that were necessary? Can a servant give anyone into custody where his object is to recover his master's property, with the custody of which he is charged? Or is his authority founded on necessity arising from his master's absence? In *Farry's Case* (1) would the defendants have been liable if the wrongful act had been done by a porter without consulting the station-master? In *Blades* v. *Higgs* (2), where the defendants were servants of the Marquis of Exeter, could the Marquis have been made responsible for the seizure of the rabbits at the railway station if the servants who seized were underlings acting without authority, and if a mistake had been made?

I think that, as in the analogous case of a sale by the master of a ship (*Morse's Case* (3)), authority can only be implied where, on the facts, as reasonably supposed to exist, there is apparent urgent necessity, and there is inability to communicate with the owner or superior officer in authority to get his directions in time. There is no such necessity, and therefore no authority for setting the criminal law in motion or arresting, where the master is at hand to give express authority, and could, and ought to have been, asked for his instructions.

The current of authority from *Owston's Case* (4) to *Hanson's Case* (5) is adverse to extending the doctrine of implied authority. In *Van Den Eynde's Case* (6), the case principally relied upon for the plaintiff, the decision of the majority of the Court turned on the plaintiff's attempt to travel without paying his fare. Besides, the detention was in respect of a matter there and then occurring: it was a case of flagrant deliot, and the station-master adopted his subordinate's action. The case, therefore, does not govern or apply here. Nor is *Blades* v. *Higgs* (7) in point, as authority was admitted, and no question of implication arose.

Davis, a cellarman, acting as occasional ticket collector at 30*s*. a week, with liability for shortage in tickets sold, was a servant of inferior rank; a substantial interval of time separated the

(1) [1898] 2 I. R. 352.
(2) 11 H. L. Cas. 621.
(3) L. R. 4 P. C. at p. 228.
(4) 4 A. C. 270.
(5) [1901] 1 K. B. 390.
(6) I. R. 5 C. L. 328.
(7) 10 C. B. (N. S.) 713.

supposed dishonest act and the arrest; and Montefiore as responsible manager could, and ought, to have been consulted.

If Fillis is estopped from denying that he was partner, the plaintiff may also be reciprocally estopped. If so, Fillis ought to have been consulted as master. I prefer, however, to rest my view on the position of Montefiore, who was in authority for absent principals, and occupied a position like that of captain of a ship. Could a ticket collector on our mail steamer half an hour after a dispute about change with a passenger give the latter into custody without informing the captain?

Under the circumstances Davis had therefore no implied authority to take the plaintiff into custody. This, which was the only point argued on this branch of the case, is sufficient to entitle the defendants to judgment.

It has, however, occurred to me as a question whether authority might not be derived from Montefiore as acting manager on the spot. Whether Montefiore, if he had personally directed or sanctioned the arrest, would have thereby made the defendants liable, may be a question of some difficulty owing to the lapse of time after the alleged mistake and the apparent uncertainty whether there was any case of felony to justify arrest: *Poulton's Case* (1). Assuming in plaintiff's favour that the owners of the Show might have been responsible for what Montefiore did, that cannot help the plaintiff. The case was tried on implied authority from the owners to Davis, and not on express authority to Davis from Montefiore. The jury were not asked to find whether Montefiore had himself implied authority from his principals, or whether he directed or sanctioned Davis's action, both plainly jury questions if there was evidence to support them. There was no satisfactory evidence of such direction or sanction. Montefiore could only ratify what he knew, and the outward and visible signs of arrest were (to say the least) far from obvious, as is plain from the police evidence: *Roe's Case* (2), *Broom's Case* (3).

The course of the trial makes it impossible to fall back on supposed responsibility through Montefiore. *Macdougall* v. *Knight* (4) is a striking illustration of this principle. There

(1) L. R. 2 Q. B. 534.
(2) 7 Exch. 36.
(3) 6 Exch. 314.
(4) 14 A. C. at p. 199.

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the trial went on wrong issues, and the plaintiff, who apparently had a good cause of action, as Lord Halsbury thought, was held bound. There are several other cases to the same effect in the Appeal Cases—*e.g. The Tasmania* (1); *Karunaratne* v. *Ferdinandus* (2).

I know of no case where, on such facts as those before us, a principal has been made answerable for unlawful arrest by a subordinate servant like Davis; and I decline to give a dangerous extension to the doctrine of implied authority going far beyond any decided case that has been brought to our notice.

The litigation from beginning to end has been a long history of mistake. Davis's arrest of the plaintiff was a mistake; it was a mistake to sue a limited company under a fancy designation, and treat such description as the firm name of a partnership; it was a mistake for persons who were not partners to appear and defend as if they were partners; and finally it was a mistake to seek to impose liability on the imaginary partnership for the fault of Davis. The case has been throughout a Comedy of Errors resulting in disappointment to all concerned.

The money lodged in Court must be paid back to the parties who lodged it, and as the plaintiff cannot, any more than Fillis and Hardacre, be heard to allege that the Company was not a legal entity capable of being sued, I think that there should be judgment for the defendants on record with costs, there being no sufficient ground for depriving them of costs. My Lord, I understand, however, thinks that Fillis and Hardacre are partly responsible for this expensive and fruitless litigation into which they intruded unnecessarily, and should bear their own costs on this special ground. This division of opinion involves that no order as to costs will be made. *Tabulæ solvuntur risu.*

LORD O'BRIEN, L.C.J.:—

This case, which has been appropriately described by my brother Gibson as a comedy of errors, presents a very novel incident in the history of litigation. It appears to me to be nothing more or less than an action against a fancy name—a *mere* name, representing neither company, nor partnership, nor firm, nor human being, man or woman. "Savage South Africa Company" purport to

(1) 15 A. C. 223. (2) [1902] A. C. at p. 409.

be defendants; but as a matter of truth and fact, irrespective of questions of estoppel, there is no such company, or firm, or partnership. There is no such company, limited or unlimited. No doubt, companies, firms, and partnerships may be sued by the name they adopt; but here there is nothing but a name—a fancy name representing a collection of animals—mostly wild beasts I believe. A sensational name was employed to attract the citizens of Dublin to a circus in the vicinity of Jones'-road, and now an action has been instituted against that sensational name for false imprisonment, false arrest, and malicious prosecution. What is in a name? was once pathetically asked. Whatever else is in a *mere* name—I repeat and emphasize the word "mere"—there is not in it a capacity to be sued at Common Law or equity. The case, though not without its lighter aspects, involves a very important question, namely, whether it was within the scope of the authority of Davis to direct the imprisonment or arrest of the plaintiff. This is a very serious question, and in discussing it I shall assume that "Savage South Africa" was a firm or partnership—that it was an entity that could employ servants and agents, and, making that assumption, I shall in the first instance deal with the question as to whether what was done by Davis in relation to the imprisonment of the plaintiff was within the scope of his authority. What was Davis? He was a mere distributor of tickets; he had been a cellarman in "Shows, Limited," and on the occasion in question he was casually employed to give a hand in the office. He was the acting ticket-seller. The manager was a Mr. Montefiore; he was the man in paramount control—was the general manager, and was on the very spot, within, I might say, speaking distance of Davis. It is very important in my judgment to show who Montefiore was. According to the plaintiff he was the man "in authority." This is the expression used. There was a conflict as to the character of his dress, but that he was the man in authority there can be no question. He was described by all as the manager, and consulted about this particular matter when the police brought up the plaintiff and his friend. The plaintiff and his friend were brought to him by the police, and after conference with him the plaintiff and his friend were discharged. Every witness from first to last

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deals with him as the man in authority. In the case of *Abrahams* v. *Deakin* (1), Lord Esher, dealing with the position of the barman in that case, said—"There was no evidence that he was general manager of the business; he only managed the bar when his master was away." In the present case there was clear conclusive evidence by admission, conduct, and categorical statement, that Montefiore was the general manager and that Davis was not; he was the mere casual ticket-seller. In my opinion Davis had no authority of himself, under the circumstances of his position, without *at least* referring to the manager, to order the arrest or imprisonment of the plaintiff. Indeed, if the plaintiff's argument that Fillis was an owner be well founded, it might be very plausibly argued that no one on the spot had authority to authorise an arrest but Fillis, and Fillis was in the ring and was not consulted.

Before discussing the law on the subject I wish to advert to two of the findings, namely, the 3rd and 4th. 3rd. Was the defendant in causing the plaintiff to be arrested endeavouring to regain and recover for his employers his employers' property? The answer to this was, Yes. If by this question is meant, was the motive object (to use an expression of the late Lord Morris) of the plaintiff to recover the money for his employer as distinguished from trying to recover it in his own interest, I do not agree with the finding of the jury. Lord Fitzgerald in *Van Den Eynde* v. *Ulster Railway Company* (2) thought this an important matter. See also the question left to the jury by Lord Blackburn in *Allen's Case* (3), referred to by Lord Esher in *Abrahams* v. *Deakin* (1). I do not think his having an interest in the matter himself, as Chief Baron Pigot said in *Van Den Eynde's Case* (2), would be material, but it is another matter whether to subserve his own interest was the operative motive of what he did. The 4th question was, "In doing so did he (Davis) believe that the plaintiff was retaining and refusing to give up money of his employers, knowing it to be so, and intending to appropriate it?" *Answer*—Yes. It will be perceived that this latter question and answer did not affirm the *reasonableness* of the belief of Davis as prompting the action he pursued. Lord Blackburn suggested in *Allen's Case* (3) that if the clerk referred to in that case had *reason*

(1) [1891] 1 Q. B. 516. (2) I. R. 5 C. L. 328. (3) L. R. 6 Q. B. 65.

to believe that the money had been actually stolen, and that he could get it back by taking the thief into custody, and if he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. Lord Blackburn threw out this suggestion, but did not affirm the proposition as good law, but we have no such finding by the jury here to render the suggestion applicable, and in my opinion it would be eminently unreasonable to suppose that if the plaintiff had taken the money, and if a half-sovereign was found upon him, it could be identified as the particular half-sovereign Davis said he lost. It is not suggested there was any mark upon it. He had in the first instance been challenged with its possession, and the plaintiff says that Davis said before he went for the police that he would make him give back the half-sovereign. Now, if he were base enough to steal the money, he could, whilst he was on the premises, be expert enough in some way, during the half-hour that occurred since the transaction, to conceal the fact of his having done so. In *Hanson* v. *Waller* (1), apparently the last case upon the subject, Mr. Justice Kennedy is reported to have referred to a judgment of a very able Judge, the late Sir Archibald Smith. He is reported to have said—"The law has nowhere been stated more clearly than in the unreported case of *Jones* v. *Duck* (2), which was a similar case to the present, and in which an attempt was made to make the defendant liable on the ground of his being the employer of the actual wrong-doer. In that case A. L. Smith, L.J., said—'The cases showed that the servant had an implied authority to give a person into custody if it was necessary to do so in order to protect the master's property. . . . The cases also showed that a person might have such an implied authority derived from the exigencies of a particular occasion.'"

I take this passage from Mr. Justice Kennedy's judgment, as I cannot find any reference elsewhere to the judgment of the Lord Justice, A. L. Smith. The case before us is not brought within the statement of the law by the learned Lord Justice. We have no finding of the jury that upon the supposition that the plaintiff had "closed upon" the money it was necessary in order

(1) [1901] 1 Q. B. 390. (1) *The Times*, March 16, 1900.

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to recover it to take him into custody. What was really the case? I shall express my view of it in one sentence. The man Davis, owing to his impecunious position and domestic necessities, was quite thrown off his balance, and half an hour after the supposed loss of the half-sovereign he went to look for it and suggested to the police that the plaintiff should be imprisoned, that he might be searched for it. And all this of his own motion without consultation with the manager, who was on the very spot, and immediately on reference to whom the plaintiff was discharged. This, in my opinion, was not within the scope of Davis's duty.

The cases upon this subject of general or implied authority as distinguished from express or particular authority are numerous. I think the subject is nowhere more exhaustively or satisfactorily dealt with than in the judgment of Sir Montague Smith in *Owston's Case* (1). He says (see page 288 of the report)—"The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority." In the present case there was ample opportunity of consulting Montefiore, who was the general manager, and was, as I have said, within speaking distance of Davis; and if Fillis is to be considered an owner, there was ample opportunity of consulting him. The time was half an hour after the transaction occurred—an interval which afforded an ample opportunity of transferring or concealing the half-sovereign. The place was, in my opinion, if an arrest or imprisonment took place, infelicitously chosen, because it involved great publicity and great disgrace to the plaintiff. And, indeed, if

(1) 4 A. C. 270.

half-a-sovereign was found upon the plaintiff, I do not see how it would be identified as the missing half-sovereign.

The case which goes farthest in limiting the scope of authority is *Hanson* v. *Waller* (1). I do not say that that case is wrongly decided, but certainly it went very far in favour of the defendant there. One of the main elements upon which the judgment rested was the opportunity which existed of consulting the owner, and that he was not consulted. Kennedy, J., said (see p. 394)—"We must consider, as was pointed out in *Bank of New South Wales* v. *Owston* (2), whether the manager had any opportunity of consulting his superior; it is in evidence that the defendant came to the house almost daily, and there seem to be no circumstances of time or place which made it reasonably necessary to take the extraordinary step that the manager took." Darling, J., said—"Here the employer was not altogether absent. He came down not infrequently to the house."

Now, in the present case, if the defendants were a company or firm the general manager was on the spot—there was no owner that could be consulted, and if on the ground of estoppel Fillis is, contrary to the truth and fact, to be considered an owner, he was on the spot; he was not consulted, though there was an ample opportunity of consulting him. Treating the Savage South Africa Company as a company or firm, and not as an individual proprietor, as in the case of *Hanson* v. *Waller* (1), Montefiore was the general manager. He was on the spot, and though there was the most ample opportunity of consulting him, he was not consulted, and Davis, the ticket-seller, took it upon himself to direct and procure the imprisonment of the plaintiff in the presence of a crowd in order to search for a half-sovereign, which, if stolen, was sure to be transferred or by some secret disposition concealed, and could not in any case, as far as I can see, be identified.

This question of arrest is, indeed, a serious matter, and has been treated by the English Courts with the greatest caution—for example, see what Lord Esher said in *Stedman* v. *Baker* (3):—"It might be that if the manager saw a person taking away the property of his master he could take that person into custody, or

(1) [1901] 1 Q. B. 390. (2) 4 A. C. 270. (3) 12 *Times* L. R. 452.

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give him into custody, for the sake of protecting the property of his master. The Court refused to decide that point in *Abrahams* v. *Deakin* (1), and they refuse to decide it now." That was the very point which Lord Blackburn threw out, but which he expressly abstained from deciding, and which Lord Esher, though twice before the Court of Appeal in England, now declines to decide. That is to say, they declined to affirm the proposition that a manager who saw property of his employer being feloniously taken could then and there give the taker into custody with a view to protect or recover it. My individual opinion would be that the affirmance of the suggested proposition would be warranted by law. But if there be any hesitation about authority to arrest when an offender is supposed to be caught *flagrante delicto*, I should say there can be no hesitation where, as in the present case, an acting ticket-seller deals in the first instance with the alleged offender as if he was not an offender, as if he got the amount of change that he was entitled to get, and half an hour later, in reference to a matter with which the plaintiff might have had no connection at all (so many had gone into the circus, and had received change), gets a policeman in the most conspicuous place to arrest or imprison with a view to making a search for a half-sovereign that could not be identified. Indeed, he not only got the plaintiff imprisoned, but his friend also, which was, indeed, a very wholesale exercise of authority. When the plaintiff and his friend were brought before Montefiore, the manager, he at once realized the impropriety and futility of the thing, and the plaintiff and his friend were let go. It is, indeed, a strong proposition that this acting ticket-seller had an implied or general authority to direct an imprisonment or arrest, when, for the object in view, the imprisonment or arrest would, under the circumstances of the particular occasion, be practically fruitless. There is no warrant in our law books for any such proposition. If the authority to arrest is not limited to the case of a person supposed to be detected taking the property of the employer, caught or supposed to be caught *flagrante delicto*, where is the line to be

(1) [1891] 1 Q. B. 516.

drawn? Where is the limit? If it can be done half an hour after the alleged occurrence is supposed to have taken place, what is the limit? Can it take place in a week or a month? In their judgments in *Van Den Eynde's Case* (1), Chief Justice Monahan and Chief Baron Pigot expressed an opinion that servants who had charge of property might, for the purpose of protecting it, give into a custody a person who was making away with it—that is to say, a person they saw, or thought they saw, in the act of taking it; that there was an implied authority by reason of their position to do so, and they both relied upon *Blades* v. *Higgs* (2) in support of their opinions. Whilst I do not at all dissent from the proposition laid down by these two distinguished Judges, with all deference to them the question of implied authority by reason of position was not decided or discussed or raised in that case. For anything that appeared in the case "the command" of the Marquis of Exeter might have been an express particular authority, and not one to be implied or inferred from position. The only question raised was the well-known question as to the ownership of the rabbits. The special plea alleged that the rabbits were seized by the servants of Lord Exeter, by his command, and the demurrer to this plea admitted the facts, and amongst other facts the command from Lord Exeter. It is very singular that if this case of *Blades* v. *Higgs* (2) had that cogent relevance on the question of general or implied authority that Chief Justice Monahan and Chief Baron Pigot ascribed to it, that though it is one of the best known cases in the books, bearing all the authority of the House of Lords, it seems never to have been applied on this question of authority by any of the Judges in England, though the question of general or implied authority, as distinguished from express and particular authority, came before them so very often. Lord Westbury said in so many words—"The only question in the case is whether game found killed and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by my authority," and it is to be remembered that *Blades* v. *Higgs* (2) was a case of servants actually seeing with the naked eye the

(1) I. R. 5 C. L. 328. (2) 11 H. L. Cas. 621.

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goods of their master, and thereupon seizing them. It was not a case of embarking upon a voyage of discovery to search for them. It will be remarked that in *Van Den Eynde's Case* (1), counting the Judges below as well as those in the Exchequer Chamber, there were ten Judges who expressed their opinion; the Judges in the Court of first instance did not refer to the case of *Blades* v. *Higgs* (2) at all, though it was cited before them; and of the Judges in the Court above, Fitzgerald and Hughes, BB., and Morris J., rested their judgments solely on the supposed breach of the bye-law; Monahan, C.J., upon the application of *Blades* v. *Higgs* (2); Lawson, J., concurred with Monahan, C.J., and Pigot, C.B., rested his judgment on two independent grounds, *Blades* v. *Higgs* (2), and the bye-law. The short judgment of Baron Hughes, in the way in which he expressed his concurrence with Fitzgerald, B., leads me to believe there was a sharp divergence of opinion as to the application of *Blades* v. *Higgs* (2). But whatever the grounds of the decision of the Exchequer Chamber in *Van Den Eynde's Case* (1), it has no application to the present. The plaintiff in *Van Den Eynde's Case* (1) was supposed to be caught in the act of taking the ticket *flagrante delicto*. The action of the clerk was adopted by the station-master, who, by reason of his position, especially with reference to the necessity for immediate action under the bye-law to prevent persons travelling in a train without paying their fare, stands in a very different position from a mere ticket-seller.

My view as to the action of Davis not being within the scope of his authority is sufficient to dispose of the case; but I think it right, under the circumstances, to express my opinion on the question of the appearances by Hardacre and Fillis, and their pleading. The argument on this part of the case seemed to me very technical. I thought now-a-days we ought to give judgment according to the actual finding of the jury, or the admitted or uncontradicted facts of the particular case. It is said that Hardacre and Fillis got the judgment set aside that they might defend; but if we look at the affidavits upon which the motion to set aside the interlocutory judgment was founded, we see the

(1) I. R. 5 C. L. 328. (2) 11 H. L. Cas. 621.

grounds upon which they sought to set it aside and sought liberty to defend. Montefiore, in his affidavit, stated as follows:—

"On the 29th day of August, 1901, I was in Dublin as the representative of Mr. John Pitt Hardacre, the managing director of a Company called 'Shows, Limited,' incorporated under the English Companies Acts, 1862 to 1898, on the 31st day of May, 1900. The certificate of incorporation of such Company is now produced, and shown to me marked with the letter 'A.' 'Shows, Limited,' were the owners or proprietors of the Show known as 'Savage South Africa,' which was exhibited in Dublin on the said 29th day of August, 1901. Mr. Frank E. Fillis, upon whom the writ of summons in this action was, I believe, served, was simply a paid servant of 'Shows, Limited.' There was and is no such Company in existence as 'Savage South Africa Company,' who are sued as defendants in this action. The said John Pitt Hardacre is a shareholder and managing director of the said joint stock Company, called and registered as 'Shows, Limited,' as aforesaid."

This was the very case that was, amongst other matters, insisted upon at the trial, all of which could be established, and was sought to be established, under the first paragraph of the defence. It is plain that Hardacre and Fillis sought to show that they were not the Savage South Africa Company—that that was the mere name of a circus which was run by Shows, Limited. The defence did not purport to be filed on behalf of Savage South Africa Company; it purported to be that of J. Pitt Hardacre and Frank E. Fillis. I give the very words:—"Statement of defence of J. Pitt Hardacre and Frank E. Fillis, delivered the 18th day of April, 1902, by Ernest W. Harris, of No. 2 St. Andrew-street, solicitor for the said defendants." As clear as the English language could express it, the defence was the personal defence of these two gentlemen. No doubt the form they adopted was formal traverses of the various allegations in the statement of claim, but the defence purported to be delivered on behalf of them personally. Now, if the plaintiff's advisers wished to take advantage of the practice sanctioned in *André's Case* (1), they should have moved to set aside the defence. On the contrary, when issue.

(1) 24 Q. B. D. 598.

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was automatically knit by lapse of time, they served notice of trial on the solicitor for the two defendants Hardacre and Fillis; and at the trial, on Mr. Gaussen's application, the Judge put the question to the jury, Were Hardacre and Fillis proprietors of Savage South Africa Company? and Mr. Gaussen asked the Judge to direct they were not. The jury were of opinion that there was no evidence to show that they were, and the Judge said he agreed with them—of course there was not a tittle of evidence to support the allegation in the first paragraph of the statement of claim that there was such a Company. A traverse of the first paragraph of the statement of claim opened up and put an end to the whole case; and the learned Judge who witnessed, and no doubt appreciated, the course of the trial tells us that he abstained from giving judgment for the plaintiff because he had a difficulty in seeing that there was any legal person or persons on the record legally responsible for the acts of Davis, Savage South Africa not being a limited company, and Hardacre and Fillis not being proprietors of the Show. Now, though I am of opinion that the defence of Hardacre and Fillis was a personal defence, still I think it was most inartistic, ambiguous, and embarrassing, and largely contributed to the embroglio which has taken place, and I am therefore of opinion that whilst the action should be dismissed as against Hardacre and Fillis, it should be dismissed without the costs of the trial or of the argument, and Hardacre should get his money out of Court. He established the case which he made when he got liberty to defend, and as a security for establishing which he brought the money into Court. The general result will be that Hardacre, who was in Manchester when what is complained of took place, and Fillis, who occupied a very subordinate position in the ring, will not be held liable for the reckless conduct of Davis, to which they were in no way parties; and the plaintiff will be vindicated by the verdict of the jury for £35, though he cannot realize it, and will not have to pay any costs to those he has selected as adversaries.

J. G. T.

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March 12.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Walker, and Holmes, L.JJ.).

Healy, K.C., and *Fitz Henry*, for the appellant.

Jefferson and *Gaussen*, for the respondents.

Cur. adv. vult.

LORD ASHBOURNE, C.:—

This is an appeal from the judgment of the King's Bench Division, and is important from the effort made by the appellant to widen and extend the doctrine of the authority sought to be implied in a servant from the scope of his employment.

The action is brought for damages for assault and battery, false imprisonment, malicious arrest, and malicious prosecution. The grievances complained of were stated to have been committed by a servant of the defendants, called Davis, who was the ticket-issuer at an entertainment called Savage South Africa. The evidence indicates that Davis believed he had given the plaintiff a half-sovereign in excess of his proper change when the plaintiff was paying for his entrance ticket and that of a friend; that Davis was busy issuing tickets at the time and for about half an hour afterwards, and that as soon as he had time he asked the manager of the show, Montefiore, to take his place to issue tickets, and then went to the plaintiff and asked for the half-sovereign, which the plaintiff denied he had received, and then Davis invoked the aid of the police. It must be taken that there was evidence that the plaintiff was arrested and detained by the policeman at the instance of Davis on the charge of knowingly appropriating a half-sovereign received by him in excess of his proper change. The charge was not persisted in, and the plaintiff, after a short delay, was liberated, but expelled from the place of entertainment. It is admitted that Davis had no express authority for his action in regard to the plaintiff, but it was urged that he had implied authority from the scope of his employment. Davis' actual position and employment are obviously of the first importance. He was a cellarman, at 30*s.* a week engaged by the people who "ran" the refreshment department. He was, as he said himself, only a ticket-taker an odd night, or to use Monte-

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fiore's words, "he was a casual hand in the ticket office." Davis said in his evidence that he did not put down the plaintiff's action as a fraud; that he was thinking of his week's wages; that he wanted to send some home to his wife, and he would be a little bit short. He added, "I did not look at it in the light of the Company. I was looking for my half-sovereign; the half-sovereign was troubling me." He had to bear the loss, and it was deducted from his money afterwards.

The case was tried before Mr. Justice Barton, who put, amongst others, the following questions to the jury:—

2. Did Davis cause plaintiff to be detained against his will by the police? *Answer*—Yes.

3. In doing so was he endeavouring to regain and recover for his employers his employers' money? *Answer*—Yes.

4. In doing so did he believe that plaintiff was retaining and refusing to give up money of his employers knowing it to be so, and intending to appropriate it? *Answer*—Yes.

5. Was Davis in doing so acting within the scope of his authority? *Answer*—Yes.

Mr. Justice Barton did not at the trial give judgment, and left the parties to move for judgment.

Both parties accordingly applied to the King's Bench Division, when the Lord Chief Justice and Mr. Justice Gibson gave judgment for the defendants, while Mr. Justice Andrews was of opinion that there was sufficient evidence to warrant the findings of the jury in favour of the plaintiff.

In addition to the substantial question, there was also a technical question, on which, if it were necessary for me to express an opinion, I would be disposed to concur with Mr. Justice Andrews, and on their acts to hold Fillis and Hardacre liable, as partners, to represent the defendants—the Savage South Africa Company.

But I prefer to rest my judgment on the substantial question which depends on the facts of the case. That question really is narrowed to the fifth question submitted to the jury—was Davis, in arresting and detaining the plaintiff, acting within the scope of his authority? Had the jury any evidence before them to warrant their affirmative finding? Assuming that Davis arrested, or procured the detention of the plaintiff, can his principals, who

employed him—when they said and did nothing—be made responsible for his actions ?

I have already shortly stated the facts. Some twenty-five minutes after Davis thought he had made a mistake in giving the plaintiff half-a-sovereign too much, without consulting Montefore, who was managing that night, or Fillis, who was in the ring, without apparently any necessity or any exigency—the plaintiff standing quietly looking at the performance—how could it be within the scope of his employment to act as he did ? The half-sovereign was not marked ; no search could have brought home guilt to the plaintiff. Mr. Fitz Henry, in his argument, suggested that Davis did not mean a real arrest, that he was only *bluffing*, hoping through "the squeeze" of the police to get back his own half-sovereign, which he would bear the loss of unless the "conscience" of the plaintiff induced him to make restitution.

There is no case in the books that I can find going near the length suggested by the plaintiff in this case for implying an authority in a servant to fix his principals with liability for acts such as Davis committed that evening. What employer would be safe if such a liability could be fixed on such a shadowy foundation ? If the mass of authorities cited are examined it will, I think, be found that their tendency is to to narrow rather than extend this doctrine of implied authority. It may be that servants may have such authority implied from the suddenness and exigency of a position which requires prompt action to save their employers' property when it is not possible to consult their employers or their manager. In the Irish case of *Van den Eynde* v. *The Ulster Railway Company* (1), although the plaintiff relied on some parts of the judgments, it must be remembered that in that case there was the act of taking the ticket *flagrante delicto*, and that the act of the ticket-taker was adopted by the station-master.

In *Abrahams* v. *Deakin* (2) Lord Esher, after discussing at length the case of *Allen* v. *London and South-Western Railway Company* (3) and the judgment of Mr. Justice Blackburn, held as an inference from that decision that there is no implied authority

(1) I. R. 5 C. L. 328. (2) [1891] 1 Q. B. 520. (3) L. R. 6 Q. B. 65.

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to take a man into custody for that which has been done. Implication of authority is not to be lightly imputed. The time, place, and opportunity of consulting the principal are all material in determining the question. In *The Bank of New South Wales* v. *Owston* (1) the action was brought against the Bank for the act of its manager in prosecuting the plaintiff maliciously. The marginal note states that "the arrest, and still less the prosecution, of offenders is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence, accordingly, is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case, it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case, evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be inferred." Sir Montague Smith's language in that case is of great weight, and has been naturally much relied on. He said, at p. 290—"An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present." Lord Esher, in *Stedman* v. *Baker* (2), says—"It may be that if a manager saw a person taking away property of his master he could take that person into custody, or give him into custody, for the sake of protecting the property of the master. The Court refused to decide that point in *Abrahams* v. *Deakin* (3), and they refuse to decide it now." But if the Court hesitated in such cases to decide in favour of a plaintiff, how can it be suggested that they would ever, under the circumstances of this case, imply such an immense authority in a casual ticket-issuer, half an hour after the occurrence, without necessity or exigency, and with an opportunity not availed of to consult the manager, the superior who paid and employed him?

(1) 4 A. C. 270. (2) 12 T. L. R. 451. (3) [1901] 1 Q. B. 520.

In the case of *Jones* v. *Duck* (1), which has been rightly referred to most prominently in the argument, A. L. Smith, L.J., gave a judgment of high authority, in which he said that the cases showed that the servant had an implied authority to give a person into custody if it was *necessary* to do so in order to protect the master's property, adding that the cases also showed that a person might have such an implied authority derived from the exigencies of a particular occasion. The weakness of the plaintiff's case is that he has entirely failed to show that Davis acted from necessity or in any emergency or exigency. In *Hanson* v. *Waller* (2) the judgment of A. L. Smith, L.J., was strongly relied on, and in language which showed a desire not to extend the doctrine of implied authority.

The jury have not found that Davis acted from necessity or in any exigency, or that any belief under which he acted was reasonable.

In my opinion the judgment of the majority of the King's Bench Division was correct, and should be affirmed with costs, and I fail to see any reason why the defendants' costs should be confined to the costs of the appeal.

WALKER, L. J. :—

The arguments in this case raised questions of importance, both of form and substance.

Savage South Africa is a name assumed for the purpose of an exhibition run by Shows, Limited. Fillis was served with the writ as representing Savage South Africa, and the plaintiff appears to me to have been regular in all this. Fillis and Hardacre appeared as defendants, and judgment having been marked by default, they instituted a motion to set aside the judgment, and obtained that favour on terms. They then delivered a defence denying that they were proprietors or managers of the Company known as Savage South Africa as alleged. They also denied that Davis, who was alleged to have done the wrongful acts, was their servant, and they traversed all the material statements in the claim. Issue was joined by plaintiff, and the case went to trial.

(1) *The Times*, 16th March, 1900. (2) [1901] 1 K. B. 390.

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The technical question arising on the rules is complicated by the motion made on behalf of Fillis and Hardacre to set aside the judgment, and by the defence and joinder of issue thereon. It may be, and I think it is the case, that one of the parties, viz., Hardacre, is estopped from denying that he is a member of this alleged firm or company of Savage South Africa. This seems to follow from *André's Case* (1). But the consideration of those questions of form, which I think under the special facts in this case is difficult and embarrassing, is wholly unnecessary, inasmuch as I am of opinion that even if Fillis and Hardacre are to be treated as members, and Davis as their servant, Davis had no implied authority to arrest or order the arrest of plaintiff.

It has been said, and I think with accuracy, that the more recent cases show certainly no indication of extending the doctrine of implied liability against an innocent employer, but however that may be, I think that in this case both reason and authority combine to establish immunity.

There are two classes of cases which may be left out of sight. There is no byelaw or statute to which the tortious act can be in any sense referred, and the present case also is not one in which the business of the Company was, in the absence of the owners, left in charge of Davis. He was a mere ticket-issuer, casually employed in that subordinate capacity at a salary of 30*s.* a week, and if he made a mistake in giving too much change to a member of the public he was liable to have the amount deducted from his weekly salary—an event which happened in the present case by stoppages after the issue of the writ. Further, there were upon the premises during the entire period two superior officers of the Company—a manager, who was, as the Lord Chief Justice points out, within speaking distance, and another, Fillis, who is described as the equestrian director. These superiors might both have been appealed to for authority before the act of arrest was committed.

Now, in the present case Davis was employed at a turnstile to receive the employers' money from persons who were taking admission tickets, and to that limited extent he was entrusted

(1) 24 Q. B. D. 598.

with the protection of the employers' property, and if, while he was admitting, say, the plaintiff, he (Cullimore) attempted to steal money lying on the top of the turnstile, or appropriated on the spot a half-sovereign given him by mistake in change, and refused to return it, there would, I think, have been an implied authority to do all acts, including arrest, necessary for the protection of the property of the employers. The duty could not be efficiently discharged unless it involved the power to arrest the offender promptly on the spot. Lord Blackburn says in *Allen* v. *London and South-Western Railway Company* (1)—"I am inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender." That authority arises from the exigency of the particular occasion. Such a circumstance did not exist here, because the plaintiff passed in, and it was a disputable and doubtful matter, even in the mind of Davis, whether the plaintiff had wrongly received half-a-sovereign too much, and no attempt to arrest was made then.

There is another case also clear in which no implied authority to arrest exists, viz., where the act is done for the purpose of punishing the offender for that which has already been done. "There is no implied authority," says Lord Blackburn in the same case, "in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice." Lord Esher in *Abrahams* v. *Deakin* (2), after citing Lord Blackburn, says—"In other words, although a servant is acting with a view to protect his employer's property against similar attempts in the future, he has no implied authority to take a man into custody for that which has already been done." Now, in the present case Davis, after a period either of a quarter of an hour, or, as said by plaintiff, twenty-five minutes,

(1) L. R. 6 Q. B. 65. (2) [1891] 1 Q. B. 520.

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went in search of the plaintiff into the show, and there caused his arrest. The only ground which could be suggested as conferring an implied authority then was that the object was to get back the property for the employer by means of the arrest, but the supposed abstraction having taken place, and the incident being complete, and even if the motive was to get back the property for the master, "the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority": *Bank of New South Wales* v. *Owston* (1). Here Davis remained at the turnstile till the work of issuing tickets became slack, and then he asked the manager, who was near him all through, to take his place at the turnstile, as he had given a gentleman 10*s.* too much. His motive was, I think, to avoid being charged in his pay. He says: "I was thinking of my week's wages; my half-sovereign was troubling me." Montefiore puts it that he asked him "Would I object to his going to endeavour if possible to regain it by asking them to count their change." Accordingly, having left the manager in his place without asking for authority to arrest, he, on his own motion, caused the arrest of the plaintiff, and when the plaintiff was brought to the manager, that gentleman washed his hands of the matter, and the plaintiff and his friend were told to go out. As the money had not been returned there might be a technical cause of action for this for breach of contract, but that is not what is complained of, and the damages would be nominal. It was also suggested that the manager then ratified the arrest. I do not think he did, but the contrary, and the case was tried on the act of Davis only, and no question as to the act of Montefiore was raised or suggested to the jury, and it is obvious a question of authority would have arisen in the case of Montefiore also, but there was not only opportunity for consulting this manager, the man in authority as he is described, but Davis deliberately abandoned it, the reason being, I think, that his motive was to save himself from losing the 10*s.*, and not to get back the property for his employers. The case of *Van den Eynde* v. *The Ulster Railway Company* (2) was strongly relied on for the

(1) 4 A. C. 289. (2) I. R. 5 C. L. 328.

plaintiff, but the facts are widely different, and every case of this kind must depend upon its own circumstances. I agree that there are *dicta* of Pigot, C.B., in that case which seem to go further than recent cases would warrant, but they must be read in reference to the facts there proved. On the evidence there the ticket had been only just taken, and all was done with the authority of the station-master and on the moment. The 3rd, 4th, and 5th findings of the jury were, of course, relied upon. I adopt as to the 3rd and 4th findings the judgment of the Lord Chief Justice. The property could not have been got back by the arrest. As to the 5th, we have to say whether there was any reasonable evidence on which the jury could find that Davis was acting within the scope of his authority. In *Allen* v. *London and South-Western Railway Co.* (1) there was a finding of the jury just as strong for sustaining a verdict for the plaintiff if there was reasonable evidence to support it, but the Court decided in favour of the defendant nothwithstanding that finding. It is a question of fact, but, like every question of the kind, must be supported by reasonable evidence.

I concur that the verdict should be entered for defendants, and the appeal dismissed, but including the costs from which the Lord Chief Justice has exempted them in the Court below, no sufficient ground under the statute being assigned for this course.

FITZGIBBON, L. J. :—

Lord Justice Holmes has requested me to read the following judgment, which he has written :—

Savage South Africa is the name of a public entertainment given by a joint-stock company called Shows, Limited, as part of its undertaking.

The plaintiff was present at one of the performances in Dublin, in August, 1901, and the present action originated in what occurred on that occasion. He paid four shillings for the admission of himself and a friend who accompanied him, giving a sovereign and receiving in change half-a-sovereign and six shillings in silver. The person with whom this transaction took place was

(1) L. R. 6 Q. B. 65.

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Henry Davis, a servant of Shows, Limited, at the weekly wages of 30*s*. His usual duties were not connected with the ticket office, but the manager being short of hands on this night directed him to assist there, and it must be assumed that he was authorized by his employers to issue tickets and receive payment therefor. About half an hour after the plaintiff and his friend entered the building Davis discovered that his cash was short by 10*s*., and it occurred to him that he had included in change to the plaintiff two half-sovereigns instead of one. It does not appear that Davis had any previous knowledge of the plaintiff, but something occurred when the latter was at the turnstile that attracted his attention at the time and caused him to remember his face afterwards.

As soon as he discovered that the money was missing he asked Mr. Montefiore, the manager, to take his place in the ticket office while he went in search of the gentleman to whom he thought he had given the half-sovereign in mistake, and being permitted to go he was not long in finding the plaintiff and his friend. The details of the interview are not very important. Davis swore that although he told the plaintiff that he had given him an extra half-sovereign, and asked him two or three times to look through his change, the plaintiff took no notice of his request.

The plaintiff, on the other hand, swore that he at once admitted to Davis that he had changed a sovereign, but that he had not received back a half-sovereign too much. Whichever of these versions is right it is clear that the errand of Davis was ineffectual, whereupon he applied first to a policeman, and then to an inspector, with the result that, in the words of the issue found by the jury, "he caused the plaintiff to be detained against his will by the police." This detention consisted in his being marched in custody over a space of thirty or forty yards within the building to the place of exit, where he was kept in charge of a policeman for a few minutes, at the end of which time he was ordered by the inspector to go out. I think it clear that the object of removing him from one part of the building to the other was to give Davis and the police an opportunity of ascertaining from the manager whether he would make any charge or authorize a prosecution, and I think it equally clear that Mr. Montefiore, on hearing the statement of Davis, declined to do so. Indeed all through

the trial the case made on behalf of the plaintiff was that his arrest and detention was the work of Davis; and I am of opinion that the evidence does not admit of the inference that the acts complained of were either authorized or ratified by the manager.

A few days after this occurrence the writ in the present action was issued against Savage South Africa Company as defendants, claiming damages for assault and battery, false imprisonment, and malicious arrest and prosecution. The defendants are neither a corporation nor an ordinary partnership, and even if judgment were given against this fancy name, it could not be executed against the goods of a non-existent company. This difficulty was met by the contention that two gentlemen called Fillis and Hardacre had by entering a joint appearance in their own names, by applying to have set aside an interlocutory judgment marked for default in pleading, and by afterwards delivering a defence, estopped themselves from denying that Savage South Africa Company was a partnership of which they were members. This branch of the case has been argued on technical grounds, and is fully dealt with in the judgments of the Divisional Court, but I see no advantage in discussing it. Even if I were to accept the plaintiff's proposition, there would, I think, still remain at least two conclusive answers to his action; and as the blunders of each side are unlikely to be repeated, the consideration of them would afford no guide to future litigants.

The estoppel contended for on behalf of the plaintiff does not seem to me to advance his case. Even if I am obliged to hold that the defendants were a partnership of which Hardacre and Fillis were members, it does not follow that Davis was their servant. In point of fact he was in the employment of Shows, Limited, of which Hardacre was a shareholder and the managing director, and Fillis was ringmaster, a paid officer. Davis was not the servant of either of them, nor of Savage South Africa Company, but of Shows, Limited.

Assuming that by entering an appearance and delivering a defence they are precluded from alleging that they are not partners in Savage South Africa, how does this estop them from showing the true position of Davis?

If at the time of the performances in Dublin they had held

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themselves out to the public generally, or to the plaintiff in particular, as being the proprietors of the show, it would, I think, be in accordance with a well-known principle of law to hold that they were not at liberty to deny that the persons engaged in running the show were their servants; but this question was not, and, having regard to the pleadings and evidence, could not have been put to the jury. There was a finding that Hardacre and Fillis held themselves out as responsible for the direction and management of Savage South Africa in Dublin; but the manager of a business, not being the proprietor, cannot be held liable for the act of a fellow-servant unless he expressly authorized it. Upon this ground alone I am disposed to think that the defendants are entitled to judgment, but there is another defence involving a question of great general importance upon which I prefer to decide the case. Assuming that Davis was in the employment of Hardacre and Fillis, I am clearly of opinion that they are not legally responsible for the acts complained of. No lawyer would argue that it is within the general scope of the implied authority of a servant employed to receive money in exchange for tickets to arrest or prefer a criminal charge against a man whom he believes to have fraudulently obtained possession of some of the funds under his control. It has, however, been held in some reported cases that special circumstances, amounting to what is described as an exigency or an emergency, may invest such a servant as Davis with authority from his master to arrest or give in custody for the sake of protecting or preserving the master's property. The authorities on this subject are numerous, and have been exhaustively examined by the Divisional Court. It would be superfluous for me to go over the same ground. Indeed the difficulty, if there be a difficulty, is not so much in ascertaining what the law is as in applying it to a particular state of facts. The most favourable case for the plaintiff is *Van Den Eynde* v. *The Ulster Railway Company* (1). There three of the Judges in the Exchequer Chamber held that a ticket clerk in the defendants' service who believed erroneously that a man was taking away a ticket without paying for it had

(1) I. R. 5 C. P. 328.

implied authority from the Company to detain him as he was leaving the ticket office, and to search him for the purpose of recovering the ticket supposed to be in his possession. It is to be noted that the other three Judges who composed the Court held that the ticket clerk had implied authority from the Company on a different ground—namely, that the plaintiff was detained in the belief that he was making an attempt to travel in a carriage of the Company without having previously paid his fare and with intent to avoid such payment, in which state of circumstances Morris, J. said it was conceded that the defendants would be liable. It is also to be observed that the arrest followed immediately the supposed theft of the ticket; and that if it had been taken, it would certainly have been recovered on searching the prisoner. The judgments of the three first-mentioned Judges go farther in inferring an implied authority in a servant to arrest for the protection of his master's property than any other judicial pronouncement with which I am acquainted; and I agree with Gibson, J. in thinking that recent decisions are adverse to extending this doctrine. Without examining in detail the many cases that have been referred to in argument, I venture to state the conclusion I draw from them. I am of opinion that three conditions must co-exist to justify the inference that a servant in the position of Davis had implied authority from his employers to arrest—(1) he must act at the time of or immediately after the supposed abstraction of the property; (2) it must be shown that before taking action he had no opportunity of consulting his master or his immediate superior; and (3) it must appear that the reasonable and probable result of the arrest would be the recovery of the property if it has been taken. All these conditions are absent from the present case. Davis did not miss the half-sovereign until he was making up his accounts after the performance began; and to infer that a ticket clerk had his master's authority to arrest for something that occurred half an hour before would be to go beyond anything hitherto decided. If we were to hold in favour of such authority, it seems to me that it would follow logically that authority ought to be equally implied if Davis had caused the plaintiff to be arrested in the street on the following day. Besides, before Davis applied to the plaintiff he

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was in actual communication with Mr. Montefiore, the business manager of the show, and the person whom Davis regarded as his superior officer. He could have asked him for directions previous to instead of after the arrest; and if he had done so the acts complained of would not have been committed. Moreover, I am unable to see how in the circumstances of this case the arrest could have led to the recovery of the money if it had been stolen or improperly appropriated. Even if a search of the person of the plaintiff at the police station had disclosed that he was in possession of half-sovereigns, there would be nothing to show that one of them had been given him in error by Davis. I am therefore of opinion that the plaintiff has wholly failed in the action, the costs of which ought to follow the event unless the order of the Court for special cause stated therein directs otherwise. It is, I fear, impossible to specify any reasonable ground for relieving the plaintiff from this liability, and therefore the result of the appeal will be to place the appellant in a worse position than that in which he was placed by the Divisional Court.

FITZGIBBON, L.J., then read the following judgment, which had been written by himself:—

I concur in the opinion that there was no sufficient evidence to sustain the finding that the acts of Davis, which were the cause of action, were within the scope of his employment, and as such were acts for which his employers, whoever they were, were responsible. I cannot attempt any definition of the condition which will justify the inference of authority which will make employers responsible for an arrest of a servant. It appears to me that the three propositions which Holmes, L.J., has laid down are not "conditions." The time of the arrest, the opportunity of consulting a superior, and the probability of advancing the master's interest are most material circumstances, and are cogent evidence upon the question of the scope of employment, but they are nothing more. Everything connected with the employment, its terms, its duties, and the circumstances under which they must be performed, the exigency of emergency upon which the arrest is made, and the manner of making it—these and the like—are all legitimate subjects of consideration; but in every case the question—in law and

fact—is one of *agency*, and comes to this—Is the act of the servant the act of his master?

Whether it is or not must depend upon all the circumstances of the particular case. General rules will not work upon varying hypotheses; and I cannot go nearer to a definition of the scope of a servant's employment than by saying that his agency extends to doing everything reasonably necessary for the efficient performance of his master's business in the station to which his master has appointed him.

In the present case, tried by any reasonable standard, it seems to me that the action of Davis in arresting the plaintiff cannot be regarded as authorized by the master, in the way in which authorization must be shown—namely, so as to make Davis the defendants' agent. It is not within the ordinary scope of a ticket-taker's employment to arrest anybody; granting that he might arrest a person whom he caught—as he believed—*in flagrante delicto* taking tickets or money of his master which were in his charge; here nothing of that kind occurred. Davis himself said that he did not "put it down as a fraud" that the plaintiff had induced him to give the half-sovereign; he did not miss it until he counted his money after the crowd had passed his turnstile. At first he told the manager that he "had given a gentleman ten shillings too much," and he went to try to get it back, not for his master, but for himself; he "was thinking of his week's wages"; he "did not look at it in the light of the Company"; he "was looking for *his* half-sovereign"; he "had to refund it, and did refund it." The arrest could not be reasonably expected to get it back; and if it was made merely to bring the plaintiff before the manager this would be inconsistent with authorizing Davis to act for the principal. I can find no evidence of agency, in motive, in action, in interest, or in duty on the part of Davis, in the arrest.

From the time the inspector and Davis spoke to Montefiore there is no evidence that he adopted or sanctioned the arrest; he said to Davis, "If you can't make any good of it you must stand by it," and he told the inspector that he would have nothing more about it. It would be a violent presumption rather than an inference from evidence to hold Montefiore responsible even for

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turning the plaintiff out of the show; but after he had been brought to the exit, there was no further arrest or assault, and though telling him to go out might be actionable as a breach of the contract to let the plaintiff see the show for his money, the action was not brought for that, nor was that cause of action mentioned at the trial. No attempt was made at the trial to make the defendants liable through Montefiore; by Davis the plaintiff must stand or fall, and in my opinion the act of Davis in arresting the plaintiff was not done by him as the agent of the defendants or of anyone else.

I shall not waste time in comparing the facts of this case with those of others, which have been decided either way; but it would add a new and startling responsibility to those already pressing upon employers if, under the circumstances proved here, a jury could be permitted to give damages against the owners of "Savage South Africa"—whoever they are—for the acts of Davis the ticket-taker done in pursuit of his half-sovereign.

What has been called "the technical question" seems to me to be important. It might have arisen in exactly the same way in an action for breach of contract or for debt, and it would be a reproach to our procedure if a plaintiff, having a substantial cause of action, could be defeated upon the point suggested. I think it only fair to the advisers of both parties to express my inability to agree with Gibson, J., and the Chief Justice in their strictures upon the conduct of the case. I feel that when I was a junior I might have taken the same course, and I am not satisfied that there were any "blunders."

Gibson, J., says:—"In this tangled litigation everything that has been done has been done wrong." "The litigation from beginning to end has been a long history of mistake."

The Chief Justice says:—"This case has been appropriately described as a comedy of errors." "It appears to me to be nothing more or less than an action against a fancy name." "Whatever else is in a mere name, there is not in it a capacity to be sued at common law or equity." Of the defence of Hardacre and Fillis he says:—"It was most inartistic, ambiguous, and embarrassing, and largely contributed to the *imbroglio* which has taken place."

I disagree with these observations.

The plaintiff went to a place of public entertainment, of which all that he seems to have known was that the business of "running the show" was carried on under the name of "Savage South Africa," and that Fillis and Hardacre were advertised as the managers or directors of it." Instead of being entertained, he was arrested, suffered a serious wrong, and voluntarily or involuntarily left the place, with what he believed to be a substantial cause of action against whoever had taken the money for his admission. Under these circumstances what was he to do? It is now said that the show belonged to a Limited Company, and that "Shows, Limited," stated to be now in liquidation, was alone answerable for the business of "Savage South Africa," described as now "bust"; and this nothwithstanding the Companies Act, 1862, sect. 41, which provides that—

> "Every limited company shall keep painted or affixed its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name mentioned in legible characters in all advertisements of such company."

This being the law, the plaintiff was justified in assuming that, whoever carried on the business of "Savage South Africa," it was not a Limited Company. Accordingly, he sued the concern as a partnership. Order XVI., Rule 14, says:—

> "Any two or more persons, being liable as co-partners, may be sued in the name of their firm."

This order expressly gives to a name the capacity to be sued. "Firm" is defined in the Standard Dictionary as "A commercial, industrial, or financial partnership; a business house; also, the style or title under which such a house carries on business; firm name." The name can be sued, but if there is no person behind the name, no judgment can be had, and no harm is done; if there is anyone behind the name, he can defend. If the service is irregular, it can be set aside by anyone who can show that he would be prejudiced by it.

There may be something comic in suing a "Savage South

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Africa Company," but as a "fancy name" it is no more fanciful, if two or more persons carried on business under it, than those of the countless firms whose titles do not contain the name of any living partner.

In the case of a partnership, the mode of service, when this action was commenced, was regulated by Order IX., Rule 9, identical with the English rule upon which *André's Case* (1) was decided—

> "Where partners are sued in the name of their firm, service *either* upon any one or more of the partners; *or* at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there, shall be good service upon the firm."

It is the clear effect of this rule that service in accordance with its terms is equivalent to personal service upon each and every member of the partnership. Fillis was the advertised manager of the show at Jones's-road; that was the only place within the jurisdiction where the partnership business was carried on; and if there were any partners, service upon Fillis was good service upon each of them.

Fillis did not know, and he had no means of ascertaining, whether he was served as a partner or as a manager, but in either case the service upon him was good service on the firm, if there was one. Accordingly he took the writ to the manager, who took it to his solicitor. What was he to do? If he ignored it he would run the risk of losing any opportunity of defending the case on the merits, for the plaintiff could move for judgment and execution against any one or more persons whom he could prove to be members of the firm, and in that proceeding membership would be the only question. He might move to set aside the writ or the service, but if he did he would have to do so on behalf of some person or persons whom he could prove to be interested, and he would have to "give the plaintiff a better writ" by telling who were responsible for the show. He took a course consistent at the same time with his duty to Fillis who had been

(1) 24 Q. B. D. 598.

served with the writ, and with securing a defence on the merits. He appeared for Hardacre, and thereby put him on the record as a duly served *legitimus contradictor*. It may have been gratuitously courageous, but it was not necessarily "a blunder."

André's Case (1) decides that a person ambiguously served cannot enter a conditional appearance, and if he enters a general appearance he does not thereby forfeit his right to rely upon any defence which he might otherwise have. I therefore agree with Gibson, J., that, unless the point was subsequently waived, Fillis' appearance does not preclude him from denying that he is a partner, and that he is entitled to set up that defence on the assumption that he was served as a partner.

But *André's Case* (1) equally decides that a person who is not a partner, or who alleges that he is not a partner, should not enter an appearance, because appearance admits service, and Hardacre cannot have been served unless Fillis was either a co-partner with him, or was the person who had the management of a business in which Hardacre was a partner. I therefore cannot agree with Andrews, J., in thinking that the defence was open to Hardacre of denying that he was a member of a partnership which carried on business under the name of "Savage South Africa." If Hardacre had not appeared, and the plaintiff had sought execution against him, his being the advertised managing director, and "Shows, Limited," being an impossible principal, having regard to the Companies Act, 1862, sect. 41, and the opportunity of defending on the merits having been prohibited, it might have gone hard with Hardacre; and it is far from clear to me that he was not well advised to appear, and to defend the case on the merits as he has done.

The form of the defence, and the affidavits, proceedings, and order, upon setting aside the interlocutory judgment, though open to argument, have not, in my opinion, waived the right of Fillis to rely upon the traverse of his being a proprietor or manager of the business, which I understand to mean a partner, and upon the traverse of Davis being his servant, but I treat Hardacre's defence as confined to the question of agency and scope of employment,

(1) 24 Q. B. D. 598.

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with which I have already dealt. The judgments of Lord Esher and Fry, L.J., seem to me to rule the present case as to both defendants.

On the point of costs, it seems to me to be illegal to deprive the defendants of the costs of the trial. The Judicature Act, sect. 53, withdrew from Irish Judges the discretion entrusted to their English brethren :—

> "The costs of every action tried by a jury shall follow the event, unless, upon application made, the Judge at the trial, or the Court, shall, for special cause shown and mentioned in the order, otherwise direct."

It does not appear that either at the trial or in the King's Bench any application was made under this section. No "special cause" is mentioned in the order, and the only cause mentioned in the judgment of the Chief Justice is that "the defence of Hardacre and Fillis was most inartistic, ambiguous, and embarrassing, and largely contributed to the *imbroglio* which has taken place." I do not take this view of the defence, and if I did, I could not consider it to be "special cause" within the Act. The costs of the action must follow the event by statute, and those of the appeal must, in accordance with our practice, abide the result here.

Solicitor for the plaintiff: *H. J. M'Cormick.*
Solicitor for the defendants: *Harris.*

R. D. M.

PARKS *v.* HEGAN (1).

(1891—B. No. 707.)

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Feb. 11, 27.

Estate by curtesy—Wife never in actual seisin—Judgment in ejectment, with stay of execution—Fee-farm grant—Renewable Leasehold Conversion Act (12 & 13 *Vict. c.* 105), *sect.* 9.

R. H., who held certain lands under a fee-farm grant, made in pursuance of the Renewable Leasehold Conversion Act, granted them by deed to his daughters M. and L., as tenants in common in fee, but continued himself in possession. M. married P., and a son was born of the marriage. An ejectment was brought by M. and L. against R. H. and others to recover the lands, and, by consent, judgment was entered, with a stay of execution during the lifetime of R. H., and he remained in possession until his death. M. died intestate during the lifetime of R. H. without ever having been in possession. R. H. having died, P., claiming as tenant by the curtesy, applied to be added as a plaintiff in the ejectment proceedings:—

Held, that, notwithstanding the consent judgment for possession, with stay of execution, there was no sufficient actual seisin in M. to entitle P. to an estate by the curtesy.

Dictum in *Robins* v. *M'Donnell* (3 L. R. Ir. 391), as to the effect of the Renewable Leasehold Conversion Act, sect. 9, observed upon by Gibson, J.

MOTION on behalf of Francis Parks and the plaintiff, Lizzie Parks, for an order that the action should be revived, and the name of Francis Parks added as plaintiff in the place of Mary Parks, deceased, and that the plaintiffs should be at liberty to issue execution on foot of the judgment obtained in the action dated 27th August, 1891.

The action was an ejectment on the title brought for the recovery of a farm of land in county Monaghan. The lands, which were held under a fee-farm grant made in pursuance of the Renewable Leasehold Conversion Act, had, by an indenture, dated the 16th February, 1887, been granted, for natural love and affection, and in consideration of 5*s.*, by Robert Hegan, who was then seized of them, to his daughters Mary and Eliza, and their

(1) Before GIBSON and BARTON, JJ.

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respective heirs, to hold unto the said Mary and Eliza, and their respective heirs, as tenants in common. Robert Hegan remained in possession. On the 19th July, 1889, Mary married Francis Parks. A son was born of the marriage on the 2nd March, 1891, who died on the 19th April following. In February, 1891, the present action was commenced; Mary Parks and her sister Lizzie, who had also married a man named Parks, being plaintiffs, and Robert Hegan, his son William Hegan, and a daughter, Martha Letitia Hegan, being defendants. Robert and Martha Letitia defended the action, but before it came on for trial gave a consent for judgment, execution not to issue during the lifetime of Robert Hegan. This consent was made a rule of Court on the 15th July, 1891, and on the 27th August, 1891, judgment for possession was entered, the judgment reciting the consent that execution was not to issue during Robert's lifetime. Robert remained in possession until his death in 1902. Mary Parks died intestate on the 5th November, 1891, without ever having entered into possession. Francis Parks now claimed that as tenant by the curtesy he was entitled to be added as a plaintiff for the purpose of enforcing the judgment. This claim was resisted by the defendant William Hegan, who was heir-at-law of Mary Parks.

W. G. Jefferson, in support of the motion :—

Actual entry on the lands is not necessary in order to entitle the husband to curtesy: 1 Co. Litt. 29*a*; *De Grey* v. *Richardson* (1); *Parker* v. *Carter* (2); Lush on Husband and Wife, 2nd ed., p. 85. At all events the judgment in ejectment was equivalent to actual entry; the effect of such judgment was to put Mary in possession of the lands: Cole on Ejectment, pp. 76, 77. The father's position, remaining in occupation under the consent and stay of execution, was merely that of a bailiff.

Chaytor, contra :—

To entitle the husband to curtesy there must be an actual seisin where attainable: Tudor's Leading Cases, 4th ed., p. 108, note to *Lewis Bowles's Case*; *Eager* v. *Furnivall* (3), *per* Jessel, M.R. The judgment in ejectment, not having been

(1) 3 Atk. 469. (2) 4 Ha. 400. (3) 17 Ch. D. 115, 121.

followed by execution, did not alter the possession: *Hollands* v. *Graham* (1), *per* Palles, C.B. The judgment by its terms could not have been executed during the father's lifetime; the effect was that he had a life estate in the lands which continued during the whole of Mary's life. Although the possession of a tenant for a term of years may be deemed the possession of the husband or wife, this principle does not apply to a person in possession under a freehold title. Here the life estate of the father prevented any seisin in the husband and wife, and, therefore, curtesy does not attach: 2 Bac. Ab. 557; Perkins's Profitable Book, par. 467; *Rex* v. *Inhabitants of Great Farringdon* (2).

Having regard to the decision in *Robins* v. *M'Donnell* (3), I do not contend that under the circumstances the fact of the lands having been held under a fee-farm grant made in pursuance of the Renewable Leasehold Conversion Act prevents curtesy attaching.

Cur. adv. vult.

Feb. 27.

GIBSON, J.:—

An interesting question of legal archæology has been discussed in this case. Robert Hegan was seized in possession of certain lands held under a fee-farm grant, executed in pursuance of the Renewable Leasehold Conversion Act. By indenture dated February 16, 1887, Robert Hegan conveyed the lands to his two daughters, Mary and Eliza, as tenants in common in fee. On the 19th July, 1889, Mary married Francis Parks, by whom she had a son. This child, born on the 2nd March, 1891, died on the 19th April following. Mary died on the 5th November, 1891. She had never entered into possession, but on the 18th February, 1891, she and her sister brought an action of ejectment, to recover the lands conveyed, against (amongst others) Robert Hegan. Judgment for possession was entered in the action on 27th August, 1891. The judgment recites a consent that execution was not to issue during the life of Robert Hegan. On his death recently, Francis Parks, claiming to be tenant by the curtesy, has moved that he should be added as plaintiff on the record for the purpose of enforcing the judgment. One of the

(1) [1894] 2 I. R. 434, 437. (2) 6 T. R. 679. (3) 3 L. R. Ir. 391.

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defendants, William Hegan, who is heir-at-law of Mary, resists the application on the ground that Mary was never seized in fact, and that her husband cannot be therefore tenant by the curtesy. The husband's counsel contends that by reason of the judgment and consent she must be deemed to have been seized in fact. This, which was the only point argued, is the matter for our decision. It seems strange that Mary never entered—a momentary seisin during coverture would be sufficient to support the husband's title.

There is a preliminary question (arising on section 9 of the 12 & 13 Vict. c. 105), which Mr. Chaytor admits is concluded by authority binding on this Court. That section prevents the statutory conversion of a lease into a fee-farm grant from operating to give dower or curtesy to the widow or husband of any person becoming entitled under the Act to an estate of inheritance. *Robins* v. *M'Donnell* (1) decides that the section does not apply to a purchaser from the grantee. We must, of course, follow that decision. The only remark that I make upon it is, that one of the reasons which the report purports to assign for the judgment is not quite convincing to my mind—namely, that the section only applies to persons who themselves take out fee-farm grants. Under section 35 a fee-farm grant may be made to one who is not absolute owner of the converted lease; and the grant enures to all the uses to which the lease was subject: *Watson* v *Watson* (2). Why a grant made to the immediate grantee should onerate the estates of other owners of the lease—who were no parties to the conversion—with dower and curtesy in respect of the new statutory fee, I feel a difficulty in seeing.

The origin, history, meaning, and reason of tenancy by the curtesy are considered with much learning by Messrs. Pollock and Maitland in their History of English Law, vol. ii. (2nd ed.), pp. 414–420. The object of the estate was to obviate the difficulty and oppression arising from wardship of the infant heir. The birth of inheritable offspring as a necessary condition to curtesy may thus be accounted for, though the reason has long ago ceased to exist. The necessity of actual seisin may be similarly explained. *Seisina facit stipitem* was the common law rule as to descent, and the heir had

(1) 3 L. R. Ir. 391. (2) I. R. 11 Eq. 523.

to derive title from the person last actually seized: *Paine's Case* (1); *Doe* v. *Hutton* (2); 1 Roper, p. 7. When the lands were unlet, therefore, actual entry was essential to the husband's title. If the lands were in the possession of a lessee for a term, the wife was deemed by virtue of such possession to be actually seized; the possession of the termor was her possession. This did not depend on the accident of her receiving rent: *Bushby* v. *Dixon* (3); Co. Litt. 15*a*. The lessee's occupation was originally regarded as that of a bailiff (Watkins on Descents, p. 108); he had no proper estate in the land (2 Pollock & Maitland, p. 36). But in the case of a freehold lease different reasoning applied. The tenant was seized of a freehold estate, and his seisin could not be imputed to the landlord; there cannot be two immediate seisins of the freehold in different persons at the same time. Perkins, who wrote early in the sixteenth century, and whose Profitable Book was first printed in 1532, in section 467 of his work states that in case of a freehold lease in force during the coverture there could be no curtesy of the lands, though he adds a quære as to the possibility of a curtesy in the rent during the currency of the lease. This doubt has been treated as unfounded by subsequent writers. Perkins himself in section 348, dealing with dower (to found which seisin in law was sufficient), says that in the case of a freehold lease a wife was not dowable out of the rent. Co. Litt. 32a is express on the point: "If the husband maketh a lease for life of certain lands reserving a rent to him and his heirs, and he taketh wife and dieth, the wife shall not be endowed; neither of the reversion, because there was no seisin in deed or *in law* of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple." Mr. Thomas, in his edition of Co. Litt., p. 559, note (10), in reference to Perkins' *quære*, reproduces Mr. Hargreave's note, which indicates that in the case put there would be no curtesy. In Roper, vol. i., p. 15, it is treated as clear that there is no curtesy of rent or reversion where there is a freehold lease. The law is stated in the same way in Carson's Shelford, p. 372. Preston on Estates, p. 215, says that, to entitle the husband, the wife must be seized of the first estate of freehold, the immediate freehold. Watkins on

(1) 8 Rep. 36. (2) 3 B. & P. 643. (3) 3 B. & C. 298.

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Conveyancing, p. 104, agrees with this. The fundamental distinction between the possession of a termor and a freeholder is further illustrated in the case of the liability of the heir for debts: see *Jeffreson* v. *Martin* (1). *Leach* v. *Jay* (2) is an interesting authority as to the force and effect of the technical word "seized."

I am, therefore, of opinion that, at Common Law, authority compels me to hold that a freehold outstanding during the continuance of the coverture, whether by settlement or under lease, prevents—certainly at least in England—the wife from being actually seized. This conclusion may seem to modern ideas unreasonable, as the maxim *impotentia excusat legem* applicable to advowsons and rents in fee might fairly have been extended to the case of freehold leases. But advowsons, &c., were in their nature incapable of actual seisin, and the law depends, not on common sense, but on feudal technicality. In Ireland, where the relation of landlord and tenant is now based exclusively on contract, the operation of the Common Law principle of seisin would seem peculiarly harsh, and the more so, as the law of descent *seisina facit stipitem* is no longer in force. But the books assume that the husband's title—founded itself on an obsolete feudal reason—remains still subject to the condition of actual seisin, irrespective of the change in the law of inheritance: and our law of landlord and tenant does not affect the freehold character of the tenant's occupation. A parcel of land cannot, apparently, at Common Law, be the subject of separate immediate seisins in different persons at the same time. It is, however, hardly necessary to decide the effect of an Irish freehold lease in this case, as the relation of landlord and tenant never existed between the daughter and father; and I leave the possible distinction between English and Irish law open for future decision.

Mr. Jefferson admits that the daughter never was in actual possession apart from the ejectment proceedings. He relies on two points, and two points only—the judgment and the stay of execution. He did not argue that actual seisin passed by virtue of the deed, which, being at Common Law, and not under the Statute of Uses, could not have that effect without entry. *Orme's*

(1) 2 Wms. Saunders, last ed., 22, 23. (2) 9 Ch. D. 42.

Case (1), decided in reference to a rentcharge, an incorporeal hereditament, is a recent authority on the point. Nor even if possession in *fact* was vested by the deed would that avail the plaintiff, as the essential condition is actual seisin at some time during the coverture. What we have to deal with is the case of corporeal hereditaments, not subject to any letting or trust, of which apparent possession after the marriage remained in the father. The first point by which constructive actual seisin is sought to be made out is the judgment which counsel contends had the effect of placing Mary in possession. He relies on Cole on Ejectment, p. 77. Mr. Chaytor, for the defendant, urges that the judgment of Palles, C.B., in *Holland* v. *Graham* (2), is an authority against the plaintiff's view.

The sentence in Cole, p. 77, cited from *Taylor* v. *Horde* (3), is not in point. The passage cited in Cole is immediately preceded by the sentence:—"He who enters under it [the judgment] in truth and substance can only be possessed according to right *prout lex postulat.*" The question there was as to seisin *after entry* under a judgment for possession, and it was held that such entry operated as a remitter to the plaintiff's original title, if any. Adams on Ejectment, p. 287, and Runnington on Ejectment, p. 446, are to the same effect. A judgment in a real action or in an ejectment did not at Common Law, in my opinion, vest the actual seisin in the plaintiff until it was executed by a writ of *habere facias seisinam et possessionem*, or by entry. In an action of detinue the judgment does not vest possession of the chattel in the plaintiff, though it declares his right. If judgment for possession without execution put the plaintiff in possession, what relation would the defendant, after judgment, occupy to the plaintiff? Mr. Jefferson suggests that he would be bailiff. This appears quite inadmissible. If the judgment of itself invests the plaintiff with possession, it might be evidence as an act of ownership against third parties. The contrary, however, has been decided: *Denn* v. *White* (4). It would appear certain that the Statute of Limitations would run from the date of the judgment, and that plaintiff would be barred by twelve years' possession reckoned from that time; if so, the possession of

(1) L. R. 8 C. P. 281.
(2) [1894] 2 I. R. at p. 439.
(3) 1 Burr. 114.
(4) 7 T. R. 112.

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the defendant must be tortious throughout. It may be said that an action for mesne profits after judgment assumes that the plaintiff has been in possession. In most cases for mesne profits there was an actual execution or entry averred, *e.g. Goodtitle* v. *Tombs* (1); *Doe* v. *Whitcomb* (2); *Wilkinson* v. *Kirby* (3); *Kenna* v. *Nugent* (4); *Harris* v. *Mulkern* (5).

Even, however, without habere or entry, the old fiction of entry and ouster, and the provisions of the Common Law Procedure Act, 1853, sections 195 and 201, as to mesne rates, probably would import that the plaintiff's possession had been trespassed on, and the plaintiff could rely on the judgment as restoring his original right to possession: *Doe* v. *Wright* (6).

I think, therefore, that judgment for possession does not *proprio vigore*, without habere or entry, put the plaintiff in actual possession or vest him with seisin in fact.

The point mainly pressed was not so much the judgment as the stay of execution. This, however, did not create any kind of tenancy, at will or otherwise, or the relation of bailiff or caretaker. It was a term of the judgment, or rather a condition on which the defendant submitted to judgment. The stay was for the life of Robert Hegan—a freehold interest. The action was on the basis that Robert was in tortious possession: *Birch* v. *Wright* (7). The consent, of the terms of which we know nothing outside what the judgment states, creates no new relation; Robert's possession could not be disturbed during his life, but it was a continuance of his old possession, and the possession was his own, and not that of the plaintiffs. The possession bears no resemblance to that of a Common Law termor. Possibly possession under the stay might not at Common Law be a continuance of disseisin; but what we have to consider is actual seisin of Mary—a matter which in this case does not depend on disseisin, but on actual possession by the wife.

Our determination depends on arbitrary technical law, which has survived to our time after the feudal reasons out of which it grew have become obsolete. In my opinion the possession of Robert

(1) 3 Wils. 120.
(2) 8 Bing. 46.
(3) 15 C. B. at p. 443.
(4) I. R. 6 C. L. 547.
(5) 1 Ex. D. 31.
(6) 10 A. & E. 763.
(7) 1 T. R. 387.

was not that of Mary, and she was not seized in fact through him by virtue of the judgment or stay. The reason for the estate by the curtesy—viz. the oppression and difficulty about the lord's wardship of the infant heir—has itself disappeared. The estate still remains as part of our positive law, but it is subject to the old conditions laid down by venerable antiquity. Applying the principles stated by Perkins and Coke, I unwillingly feel compelled to decide against the husband.

BARTON, J. :—

This is an application on behalf of Francis Parks that this action may be revived by substituting his name as plaintiff in place of his late wife Mary Parks, and that the plaintiffs may be at liberty to issue execution on foot of the judgment in the action, dated August 27th, 1891. The plaintiff claims as tenant by the curtesy. His claim is resisted by one of the defendants, William Hegan, who is heir-at-law of the late Mary Parks.

The material facts of the case are as follows :—By deed dated February 16th, 1887, the late Robert Hegan granted certain lands of Brackley, in county Monaghan, for natural love and affection, and in consideration of 5*s*. to his two daughters Mary and Lizzie Hegan, to them and their several and respective heirs and assigns for ever as tenants in common. He remained in possession. The two daughters subsequently married men named Parks. Mary married the applicant Francis Parks on the 15th July, 1889. A son was born of the marriage on the 2nd March, 1891, and died on the 19th April following. In February, 1891, Mary and Lizzie Parks commenced an action of ejectment on title for recovery of the lands, in which Robert Hegan was one of the defendants. Robert Hegan defended the action, but before it came on for trial a consent for judgment was given, dated the 15th July, 1891, which was made a rule of Court, by which it was consented that the plaintiff should have judgment, but that execution should not issue during the lifetime of Robert Hegan. In pursuance of this consent judgment was entered up on the 27th August following, and Robert Hegan remained in full and undisturbed possession of the lands and their profits. Mary Parks herself died intestate on the following 5th November,

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1891. Robert Hegan remained in possession until his death, nearly eleven years afterwards, on the 27th July, 1202. On these facts we have to decide whether Francis Parks is entitled to an estate by the curtesy for his life in these lands.

There are four requisites for an estate by the curtesy, viz. (*a*) a legal marriage; (*b*) issue born alive of the marriage capable of inheriting the estate; (*c*) death of the wife; and (*d*) "actual seisin" or "seisin in deed" by the wife during coverture if such seisin was attainable. It is clear on the facts that requisites (*a*), (*b*), and (*c*) are present in this case. The only question for us is whether requisite (*d*) is present, or, in other words, whether Mrs. Mary Parks ever had during her coverture "actual seisin" or "seisin in deed" of these lands, and whether such seisin was attainable.

I understand Mr. Jefferson to have presented four separate views of his client's case. He suggested that Mary Parks may be considered to have obtained "actual seisin," (1) by virtue of the execution of the conveyance of 1887; or (2) by virtue of the grantor's possession after the execution of that deed; or (3) by the recovery of the judgment in ejectment in 1891; or (4) by the possession of Robert Hegan after judgment in ejectment under the consent for stay of execution.

In the first place I do not think that it can be maintained that mere execution of the deed of grant conferred "actual seisin." It is, of course, true that, under our present law, land may be effectually granted without livery of seisin; but where "actual seisin" is necessary by law, as it is in the present case, the delivery of the deed would no more confer "actual seisin" than it would confer "actual possession" of lands within the meaning of section 26 of the Reform Act, 2 Wm. 4, c. 45. In *Murray* v. *Thorniley* (1), which was a case, turning upon section 26 of the Reform Act, about "actual possession" of a rentcharge, Tindal, C.J., at p. 224, contrasted "actual" possession with such possession as the delivery of a deed of grant would confer, and said incidentally as to a conveyance of lands, that to constitute "actual possession" it was "quite clear that in the *case of land* there must be more than the execution of the conveyance—that there

(1) 2 C. B. 217.

must be actual possession or receipt of the rents and profits." That case was followed in *Hayden* v. *Overseers of Twerton* (1) and in *Orme's Case* (2). On the other hand, on the same words of the same section of the Reform Act, it was held in *Heelis* v. *Blain* (3) and in *Hadfield's Case* (4) that in consequence of the language of the Statute of Uses, a conveyance operating under that statute would be deemed to confer "actual possession." It is worth noting that Mr. Joshua Williams in his work on Settlements, at page 20, when referring to these cases, distinguishes the "constructive actual possession," which is deemed to be given by the Statute of Uses, from the plenary "actual possession," which would have enabled a grantee to maintain trespass. But it is not necessary for our present purpose to consider whether a conveyance operating under the Statute of Uses could have been deemed to confer "actual seisin" in the sense in which that word is used in the branch of the law with which we are concerned in this case. Suffice it to say that the conveyance of 1887, with which we are concerned in the present case, cannot have that effect.

In the second place, it was suggested that after the execution of the deed of 1887 the possession of the grantor ought to be regarded as that of the grantee. It must, however, be borne in mind that what is requisite in the present case is "actual seisin" *during coverture*. The only evidence which we have as to the nature of the grantor's possession during the coverture of Mary Parks indicates an adverse possession, not under or conformable to the deed, but in spite of it, necessitating an action of ejectment against the grantor, which was compromised on terms which appear to have been favourable to him. I can see no evidence of any such possession by the grantor under this deed during the coverture of the grantee as ought to be considered equivalent to the "actual" possession or seisin of the grantee.

Mr. Jefferson argued, in the next place, that the judgment in ejectment in 1891 had, *per se* and without execution thereon, the effect of conferring "actual" seisin on the plaintiff, but he cited no authority for that proposition. Indeed it is not

(1) 4 C. B. 1.
(2) L. R. 8 C. P. 281.
(3) 18 C. B. (N. S.) 90.
(4) L. R. 8 C. P. 306.

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easy to find any direct authority as to the effect of an unexecuted judgment in the modern action of ejectment in relation to the feudal conception of "actual seisin." But some light may be thrown upon the subject by reference to the effect of recoveries suffered, or of fines levied, or of judgments for the recovery of land or "rent" under the old law, when not followed by execution. It would appear from Comyn's Digest (vol. vii., Seisin (A) "Seisin in fact," and (C), "What seisin is sufficient to maintain an assize") that a recovery suffered *and execution thereon* would confer such actual seisin as would satisfy the requisites of an estate by the curtesy, or enable a plaintiff to maintain an action of Assize, and that a plaintiff in an action of Assize would be considered to have had actual seisin, "if he recovers rent and the *sheriff upon a writ of execution puts him in seisin* of the rent." Again it would appear (see, for example, Watkins on Descent, [24] and [25]), that to make a person claiming by descent a stock of descent, the old maxim *seisina facit stipitem* had to be satisfied, and that the levying of a fine *without execution* would not have been deemed to amount to such actual seisin as would satisfy that old maxim. Then, if we proceed to refer to the old real actions, it may be noted that the old writ of *habere facias seisinam* or writ of seisin was the writ of execution in all real actions, and it ran "*cum A recuperaverit seisinam suam*," and I infer that the plaintiff was not invested with the actual seisin until delivery of possession under this writ. The modern writ of *habere facias possessionem* differs from the writ of seisin. The possession which it contemplates is not necessarily the same as the old seisin of the freehold. But if, under the old law, a judgment in a real action, a levying of a fine, a suffering of a recovery, a judgment for "rent," did not confer actual seisin without execution, why should an unexecuted judgment in the modern action of ejectment have greater effect?

There remains the last branch of Mr. Jefferson's argument. He contended that, after the judgment in ejectment, the possession of the defendant Robert Hegan, under the terms of the stay of execution, was equivalent to the possession of the plaintiff in the ejectment, and he cited cases in which the possession of a lessee for years or a trustee has been held to be consistent with

the actual seisin of the lessor or *cestui que trust*. In considering this argument it is important to bear in mind what really happened. If Mrs. Mary Parks had taken out a writ of *habere* and the sheriff had executed it, or if after or in lieu of execution she had allowed Robert Hegan in as tenant for years or at will, or as caretaker, actual seisin would have been attained by her. But what happened in this case was very different. Robert Hegan, being in actual possession, only agreed to admit Mary Parks' right to possession on the terms of not having the judgment executed during his lifetime. Accordingly by this consent Mary Parks, in consideration of having her right to possession admitted, excluded herself from actual possession for the period of her father's lifetime. She was worse off as regards "actual seisin" than she would have been without a judgment or with an unfettered judgment. Without a judgment she would have had an immediate right of entry. With an unfettered judgment she would have had an immediate right of execution by the sheriff. But under the terms of this consent she seems to me to have in effect agreed to postpone her right of taking "actual seisin" until after her father's death. On this state of facts I can see nothing in the case that would make the possession of Robert Hegan after this judgment analogous to the possession of the lessee in *De Grey* v. *Richardson* (1), or of the trustee in *Parker* v. *Carter* (2), nor any such circumstances as those which in *Eagar* v. *Furnivall* (3) made the maxim *impotentia excusat legem* applicable to that case. I have not discussed these authorities in detail, because I do not think that they really assist us in this case, which must be decided on principle.

We cannot obtain much assistance from the old feudal reasons for this rule of law, because the ancient reasons for this requisite of "actual seisin" in the case of an estate by the curtesy are now obsolete. One reason had its origin in the maxim "*Seisina facit stipitem*," which ceased to be a rule of the law of descent by the operation of section 2 of the Inheritance Act, 1833 (3 & 4 Wm. 4, c. 106). Another reason why the old law required "actual seisin" in the wife during her coverture, as a requisite of the husband's estate by the curtesy, was to provide an inducement

(1) 3 Atk. 469. (2) 4 Hare, 400. (3) 17 Ch. D. 115.

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to the husband to bring his wife's freeholds into possession during her lifetime, and a reward to him for doing so. (See Appendix E to Williams' Real Property, 19th edition, p. 673, and the judgment of Jessel, M.R., in *Eager* v. *Furnivall* (1).) This was in accordance with the old idea of "profitable guardianship," which, from early times, exercised much influence upon our law of husband and wife. The husband's power and duty of bringing his wife's freeholds into possession may now be said to have passed away, in view of the wife's enlarged powers of acquisition, disposition, and of bringing actions alone, as if she were a *feme sole*, under the provisions of the Married Women's Property Act, 1882. As a result, this old reason for requiring in a curtesy case "actual seisin" in the wife, so as to provide an inducement to the husband to bring her freeholds into possession during her lifetime, has lost its meaning. But rules have often outlived their reasons in the history of our law, and the requisite for actual seisin in the wife appears to remain, although all its old feudal causes may have disappeared. Accordingly, if the wife under the present law omits to bring, or agrees not to bring, her freeholds into her actual possession during her lifetime, may she not defeat her husband's estate by the curtesy, and has she not done so in this case? It is admitted that "actual seisin" was attainable by her, and that she never had "actual" possession, and I can find nothing in this judgment in ejectment and stay of execution which, according to principle, can dispense with or afford a substitute for such "actual" possession.

The word "seisin" is a mutable and elastic word, used sometimes in a general, and sometimes in a special sense; but it would appear that, as a general rule, wherever "seisin in deed" or "actual seisin" is contrasted with "seisin in law," as it is in a curtesy case, it involves the idea of actual corporeal possession and enjoyment by the person in question, or by some person on his or her behalf, as contrasted with mere right to possession. If that is so, it occurs to me that a striking example of a right to possession, as contrasted with

(1) 17 Ch. D. 115.

actual corporeal possession, is presented by a judgment in ejectment on the title unexecuted, as contrasted with possession actually obtained under a writ of *habere* by execution or otherwise.

For these reasons I am of opinion that the applicant has failed to establish his claim as tenant by the curtesy to these lands.

Solicitor for Francis Parks and Lizzie Parks: *H. R. Emerson.*
Solicitor for Wm. Hegan: *R. E. Bailie.*

J. G. T.

NORTHMOOR STEAMSHIP CO. *v.* HARLAND & WOLFF, LIMITED (1).

(1900. No. 11,663.)

Ship—Charter-party—"Cargo to be taken from alongside, always within reach of ship's tackles"—"Custom of port to be observed"—Custom of port of Belfast—Expense of chaining and rafting timber—Admissibility of custom.

By a charter-party a ship was to deliver cargo, as customary, at such place as the consignees might direct, always afloat; cargo to be taken from alongside at port of discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat; the custom of each port to be observed in all cases where not specially expressed. The cargo consisted of log timber, to be delivered at the port of Belfast, and a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and it had been measured by the official measurer:—

Held, that the consignee, and not the shipowner, was liable to pay the expense of such rafting.

Held, also, that as the measuring was for the benefit of both shipowner and consignee, the latter was not entitled to waive the chaining and measuring and insist on the timber being delivered log by log over the vessel's side.

THIS action, which was tried before Mr. Justice Barton and a special jury of the county of the city of Belfast, was brought by

(1) Before PALLES, C.B., and JOHNSON, J.

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the plaintiffs, the owners of the steamship "Ventmoor," against the defendants, the consignees of the cargo, to recover freight on the carriage of timber from Alabama to Belfast, the amount in dispute being an item of £38 4*s.* 4*d.*, the cost of chaining and rafting the timber at the port of Belfast. The plaintiffs contended that, by the terms of the charter-party, this charge ought to be borne by the consignees; defendants contended that, by the charter-party and the custom of the port of Belfast, the charge was to be borne by the shipowner. The defendants also relied on an offer made by them to accept delivery of the timber, log by log, over the ship's side.

By the charter-party the ship was to load a cargo of timber and proceed to the ports named therein (one of these being Belfast) as ordered, and "there deliver her cargo as customary at such wharf, dock, or place as consignees of cargo may direct on arrival, always afloat and in accordance with Bills of Lading." "Cargo to be delivered to vessel alongside, and to be taken from alongside at port of discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat. Lighterage, if any, to be at the risk and expense of cargo." "The cargo to be delivered alongside at merchant's risk and expense, and to be received by master and secured by the ship's dogs and chains when so delivered, and to be then at ship's risk." "The custom of each port to be observed in all cases where not specially expressed."

The cargo in the present case was directed by the consignees to be delivered at the port of Belfast, and the discharge of the timber took place at that port in a dock measuring 600 feet by 580, the ship being berthed on the west side about 30 feet from the wall. By the bye-laws of the Belfast Harbour Commissioners, timber discharged into the waters of any dock, basin, or other part of the harbour, is to be immediately marked for identification and rafted. Evidence was given at the trial that the practice at the port of Belfast, as to the discharge of log timber, is to lift the logs from the hold by "dogs" or chains, and put them over the side, either letting them drop or lowering them by means of the ship's tackles into the water. These tackles are up to 110 fathoms in length. When several logs are in the water, men in boats below commence to "dog" them together into a raft, that

is, "dogs" or staples with chains are driven into the logs, and the logs bound together by the chains. As each raft is completed it is shoved aft or forward, according to the orders of the deputy harbour master, and room is made for more rafts. This process goes on until the entire cargo is taken away—an operation which, in a ship such as the "Ventmoor," would take seven or eight days. After the logs are put into rafts the timber is measured by the official measurer, who usually comes to measure when there is a day's work ready for him. The freight is paid on the measurement of the official measurer. As deposed by one of the plaintiffs' witnesses, the rafts are made up 50 or 60 feet from the ship, according to the wind; one of the defendants' witnesses stated that the rafts were made up 60 feet away from the ship, and sometimes more. Evidence was tendered by the defendants and received, subject to objection by plaintiffs, of a custom of the port of Belfast, that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and the timber had been measured by the official measurer of the port. The defendants' manager stated in his evidence that "ship's tackle" is a rope or chain, and is always long enough for the whole dock; that the timber may be "alongside" anywhere in the dock, and within reach of ship's tackle anywhere in the dock, and the addition of the words "within reach of ship's tackle" made no real difference; that "alongside within reach of ship's tackle" meant any distance in dock or port where the chains could reach, and was to be construed in each case by the length of the ship's tackle. Evidence was also given by him that, prior to the arrival of the "Ventmoor," a dispute had arisen between himself and the plaintiffs' agent as to the liability to pay for the rafting of the timber, and that he stated to the plaintiffs' agent that the defendants would not pay for it, as they had never done so before, but he offered to take the cargo from the ship log by log as it came over, which offer was not accepted. The chaining and rafting were subsequently done by the plaintiffs, and paid for by them under protest.

The following questions were submitted to the jury:—1. Was there in June, 1900, a custom of the port of Belfast that the delivery of log timber to the consignee was to be made after the

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ship had rafted and chained the timber, and the timber had been measured by the official measurer of the port? 2. Did defendants offer to receive, and plaintiffs refuse to deliver, the logs, log by log, over the ship's side? The jury answered both questions in the affirmative. Mr. Justice Barton abstained from giving judgment. Both plaintiffs and defendants now moved for judgment.

Campbell, K.C., *Hume, K.C.*, and *M'Gonigal*, for the plaintiffs.

Serjeant Dodd, *Gordon, K.C.*, and *William H. Brown*, for the defendants.

The following authorities were referred to :—

"*The Nifa*" (1); *Petersen* v. *Freebody & Co.* (2); *Aktieselkab Helios* v. *Ekmann & Co.* (3); *The Brenda Steamship Co.* v. *Green* (4); *The Alhambra* (5); *Postlethwaite* v. *Freeland* (6); *Holman & Son* v. *Dasnieres* (7); *Marzetti* v. *Smith & Son* (8); *Holman* v. *Wade* (9); *Stephens* v. *Wintringham* (10).

Cur. adv. vult.

June 28.

PALLES, C. B. :—

The question for decision is whether, under the circumstances of the case, the shipowner, or the consignee of the cargo, is the person who is to bear the expense of a certain operation called "chaining and rafting," in course of the discharge in the port of Belfast of a cargo of timber from the plaintiffs' steamer "Ventmoor."

By the bye-laws of the Belfast Harbour Commissioners, timber discharged into the waters of any dock, basin, or other part of the harbour, is to be immediately marked for identification and *rafted*.

It appears that, according to the custom of the port of Belfast,

(1) [1892] P. 411.
(2) [1895] 2 Q. B. 294.
(3) [1897] 2 Q. B. 83.
(4) [1900] 1 Q. B. 518.
(5) 6 P. D. 68.
(6) 4 Maritime Law Cases, 302.
(7) 2 *Times* L. R. 607.
(8) 49 L. T. (N. S.) 580.
(9) *The Times*, 11th May, 1877.
(10) 3 Commercial Cases, 169.

the mode in which the discharge of a cargo of timber from a steamer such as the "Ventmoor" is commenced, is by taking the logs from the hold by the ship's winches, and then placing them on rollers, from which they are rolled over the side of the vessel into the water. When several logs are in the water, men in boats below commence to dog them together into a raft, by driving into the logs dogs or staples with chains attached; and as each raft is completed, it is shoved aft or forward, according to the orders of the deputy harbour master, and thus room is made for more rafts. This process is repeated until the entire cargo is taken away—an operation which, in a ship such as the "Ventmoor," takes seven or eight days. After logs have been thus shoved away, the timber is measured by the official measurer, who usually comes to measure when a sufficient amount of timber has been rafted to require a day for its measurement.

The evidence is not very precise as to the distance from the ship at which the rafts are made up. One witness, Mr. Quinn, who was examined for the plaintiffs, said that it is usually about 50 or 60 feet away from the ship, more or less, according to the wind. The official measurer, Mr. Atkinson, who was one of the defendants' witnesses, says that the rafts are made up 60 feet away from the ship, or sometimes more. Probably the correct conclusion, on the entire evidence, would be that the places of making up depend upon the directions of the deputy harbour master, who, of course, has regard to the safety and convenience of other vessels, and the due despatch of the discharge.

By the charter-party, the ship was to "deliver cargo, as customary, at such wharf, dock, or place as the consignees of cargo may direct on arrival, always afloat, and in accordance with the bills of lading." "Cargo to be delivered to vessel alongside" at port of loading, "and to be *taken* from alongside at port of discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat." "The custom of each port to be observed in all cases where not specially expressed."

At the trial evidence was tendered by the defendants, and received, of a custom of the port of Belfast that the delivery of log timber to the consignee was to be made after the ship had chained

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and rafted the timber, and after it had been measured by the official measurer; and it was found that there was such a custom.

This custom does not go to the extent that the ship is to pay the expense of the rafting; and, so limited, it was not inconsistent with the charter-party, which provides that the ship shall "deliver her cargo as customary." The evidence, therefore, of the custom was properly received. But had the custom involved, as it is now contended that it does involve, that the ship should be bound, as between it and the merchant, to bear the expense, I would have held that to that extent it would be inconsistent with the charter-party, and inoperative. By clause 11 the cargo is to be *delivered* to the vessel alongside, and to be *taken* from alongside at merchant's risk and expense. A marked distinction is here drawn between the two words "delivered" and "taken." The two expressions plainly mean, in relation to a port in which the custom is such as it is in the port of Belfast, different things. In an earlier part it is provided that "the cargo is to be *delivered* as customary at such wharf, dock, or place as the consignees may direct." In my opinion, the effect of the two clauses is that, although the actual delivery of the cargo is not complete until it has arrived at the customary place of delivery, which may be at a considerable distance from the vessel, the expense of *taking* the cargo "from alongside" to that place where the delivery is complete is, under clause 11, to be borne by the consignees; and thus I think the question here is, whether the operation of rafting is "alongside . . . within reach of the ship's tackles."

The expression "ship's tackles," as used here, plainly means the gear connected with the winches. If, then, a cargo were by that custom to be discharged into a boat or lighter alongside the ship, I would hold that the expense of dealing with the cargo, from the time it was placed in the boat and released from the ship's tackles, ought to be borne by the merchant. So, too, as here, when, according to the custom, the discharge commences by shoving the timber into the water, instead of using the ship's tackles, I am of opinion that the expense of taking the timber from the place in the water into which it has been shoved from the ship should be borne by

the merchant There was no attempt in the evidence to show any express limitation of the custom to cases in which the measuring or rafting should take place within reach of the ship's tackles; nor is the custom, as found, so limited; and the only attempt to show that such limitation is implied is in the evidence of Mr. Carlisle, the defendants' manager, who suggested that from the length of the vessel's cables, which he treated as included in the expression "tackles," the timber, when in any part of the dock, would be "within reach of the ship's tackles." But this view gives to "tackles," in the expression "within reach of the ship's tackles," a meaning which it is not capable of having; and even were this so, for the reasons I have already stated, it would not alter my opinion.

In *Holman* v. *Wade* (1), only reported in *The Times* newspaper, but recognised in some cases reported in the regular Reports, the cargo was, as here, "to be taken from alongside at merchant's risk and expense, as customary." According to the custom, the cargo had to be stacked on the quay. The defendant offered to prove a custom of the port (Hull), that the ship should pay for the stacking. Manisty, J., rejected evidence of this custom, and the Court of Appeal confirmed this rejection. In "*The Nifa*" (2) the charter-party was very similar to the present. "Cargo to be brought to and *taken* from alongside the ship, at merchant's risk and expense, where she can lie always afloat and safe." "The cargo to be discharged . . . according to the custom of the port." The vessel was moored 15 feet from the quay edge, which was as near as the vessel could be always afloat. This caused an extra expense in the discharge of 9*d.* per standard. Evidence was admitted of a custom that the shipowner should deliver on the quay, and it was, therefore, contended that he should bear the extra cost of the discharge between the ship's rail and the quay. It was held that the custom and the charter-party were not inconsistent, but that the consignee should bear the extra cost of discharge between ship and quay. A. L. Smith, J., says:—"The shipowner was to put the goods on the ship's rail, and the expense from the rail to the quay

(1) *The Times*, 11th May, 1877. (1) [1892] P. 411.

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the merchants were to pay. Then, by the charter-party, the cargo is to 'be discharged . . . according to the custom of the respective ports.' . . . I am asked to strike out the words 'at merchant's risk and expense.' It is said you must do so because there are the words in writing, 'and according to the custom of the respective ports.' I read those words as meaning the mode of loading or unloading, or it may be as to *where the goods are to be delivered*; but that does not contradict that part of the contract which is staring one in the face, namely, that the taking to and from the ship's rail is 'at merchant's risk and expense.' In my view this is a clear case."

In *Aktieselkab Helios* v. *Ekmann* (1) the charter-party provided that "the cargo" (deals) "was to be brought to and taken from alongside at merchant's expense"; and it was held that a custom that the shipowner was bound to put long lengths of timber at the port of discharge into lighters, in such a way and to such an extent that the lighters might fairly be deemed to be loaded, was not inconsistent with the charter-party. There Smith, L.J., says the custom does not contradict the charter; it is merely that "there is no right delivery from the ship's side until the long lengths of timber have been put into the barge." There the whole transaction was alongside. One part of the timber was in the port-hole, and at the same time another part of it was in the barge, and the question was as to the mode in which it should be so put in. There was, however, a further custom insisted upon there, *viz.*, that the shipowner should be under the obligation of stowing the timber in the barge, in the sense of arranging it so that the barge might be conveniently navigated, and would be loaded to her full capacity. Whether that latter custom was consistent with the charter was not decided.

The case most in favour of the defendants is *Stephens* v. *Wintringham* (2). There the charter-party provided that the cargo (timber) "should be taken from alongside at merchant's risk and expense, according to the custom of the port." By the custom of the port of discharge, timber cargoes were taken from the ship's hold by means of ship's winches and slings, by stevedores employed

(1) [1897] 2 Q. B. 83. (2) 3 Commercial Cases, 169.

and paid by shipowner, and by them carried to the far side of the quay, about 60 feet from the side of the vessel, and there lumped or roughly piled. It was practically impossible to deposit the cargo on any other part of the quay. It was held that the shipowner was bound to carry the cargo across the quay and lump it at his own expense; and that such delivery constituted delivery alongside, within the meaning of the charter-party. Mr. Justice Bigham, in giving judgment, says:—"The stevedore has a certain amount of quay space on which to put the cargo. The merchant does not in any way interfere with the stevedore. The stevedore chose the only place he could choose for lumping this cargo, and that was 60 or 70 feet from the ship's side. In my opinion that was alongside the ship, and nothing more than alongside." I think the ground of that decision was that, according to the custom of the port, the shipowner was bound to discharge on the quay, and that the only part of the quay upon which he could discharge was a place which was 60 or 70 feet from the ship's side, so that he did no more than perform his obligation, although the mode of performance was rendered more expensive and onerous to him by the acts of those over whom neither he nor the merchant had control. This is the only view of the case which is consistent with *Holman* v. *Wade* (1) and "*The Nifa*" (2). Here, the acts the payment for which is in controversy are acts independent of, and subsequent in point of time to, any act the expense of which the ship is under an obligation to bear. I read the words in the charter-party, "deliver her cargo as customary," as referring to the place at which the goods were to be delivered, as A. L. Smith, J., read them in the case of "*The Nifa*" (2); and the 11th clause as providing for the expense of *taking* the cargo from the ship's rail to that place. The provision is that such expense shall be borne by the merchant. In other words, my judgment is grounded on the distinction between the words "delivered" and "taken."

I have not referred to "*The Brenda*" (3), which, if applicable, would be conclusive in favour of the plaintiffs, as there the charter-party differed from that here, by expressly excluding the custom.

(1) *The Times*, May 11, 1877. (2) [1892] P. 411. (3) [1900] 1 Q. B. 518.

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The defendants also rely upon an offer of Mr. Carlisle to accept delivery of the cargo log by log as it was shoved overboard; but, in my opinion, he was not entitled to receive it at that time. The delivery was not then complete; and the act remaining to be done before complete delivery, *viz.*, the measuring, was one which the merchants were not entitled to waive, as it was one for the benefit of both parties, each being, under the charter, entitled to have it measured "as customary at the port of discharge," in order to ascertain the amount of the freight.

For these reasons I am of opinion that the verdict and judgment should be entered for the plaintiffs with costs.

JOHNSON, J.:—

I am of the same opinion. The "Ventmoor" is a steamship, and her cargo was pitch pine logs. The question to be decided is, whether the plaintiff, the shipowner (represented by the master of the ship), having unloaded his cargo in the open water of the dock at the port of Belfast, "alongside his ship and within reach of the ship's tackles," is liable to defray the cost of chaining and rafting the logs so outside and alongside his ship in the open water. This dock measures 600 feet by 580 feet. Ordinarily and usually the duty of the master of the ship is to place the cargo outside over the rail of his ship within reasonable reach of the consignee (popularly the merchant), so that the merchant can receive it, and the duty of the merchant is then and there to receive it. The duty of the master and ship's company is inside his ship. The duty of the merchant and those in his employment is outside the ship, and the act of delivering and receiving the cargo is the conjoint act of the master and ship's company and the merchant and his servants. This ordinary and usual duty is generally (according to the special circumstances of the case and the nature of the cargo) varied or qualified by express contract. In the present case the contract is contained in the charter-party, which provides, as to the discharge, that the ship at the port of discharge, always afloat, shall "there deliver her cargo as customary at such wharf, dock, or place as consignees may direct." This ship was directed to deliver her cargo in the dock, at the

port of Belfast, in the open water of the dock. The charter-party provides that "the custom of the port is to be observed in all cases where not specially expressed." The ship might have been ordered to any one of several ports, in each of which the custom might be very different. The charter-party in this case is, therefore, to be read and construed with the recognised usage or custom of the port of Belfast incorporated in it, so far as that usage or custom is proved and is consistent with the express terms of the charter-party. If this usage or custom is inconsistent with or contradicts the express terms of the charter-party so that they cannot stand together, the usage or custom must be rejected, and the charter-party must prevail. The custom in the present case is found in the following terms:—"The delivery of log timber to the consignee is to be made after the ship has chained and rafted the timber, and the timber has been measured by the official measurer of the port." Delivery here must, I apprehend, be taken to mean such complete delivery as places the log timber under the control and dominion and at the absolute disposal of the merchant: see Willes, J., *Meyerstein* v. *Barber* (1). The express terms of the charter-party provide for the delivery and loading of the logs at the port of loading, and for the unloading and delivery of the logs at the port of discharge: the ship in either case always to be afloat.

At the port of loading the cargo of logs is to be "*delivered* to vessel alongside, always within reach of ship's tackles" (she had more than one winch and tackle), and at merchant's risk and expense." So *delivered*, the logs were placed under the control and dominion of the ship's master and at the ship's risk for the purpose of loading, and in that condition of things the charter-party required the master to secure the logs with the ship's dogs and chains, to prevent them from going adrift, while in the usual and proper manner, and with due expedition, and with the usual and proper ship's appliances, he was getting the logs aboard and storing them for the voyage. At the port of discharge the charter-party provides for the unloading and delivery of the cargo. The "Ventmoor" arrived at the dock at Belfast, and there afloat was

(1) L. R. 2 C. P. at p. 50.

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Johnson, J.

ready to unload her cargo. The charter-party in express terms is "cargo to be *delivered* to vessel alongside" (that is at port of loading), "and to be *taken* from alongside, always within reach of ship's tackles, and at merchant's risk and expense" (that is at port of discharge), "vessel always lying afloat. Lighterage, if any, to be at risk and expense of cargo." Here there is a clear distinction made between "*delivery*" to the master alongside for loading and "*to be taken* from alongside by the merchant at the merchant's risk and expense": and if and so far as the custom found is inconsistent with this express provision of the charter-party, the custom must be rejected, unless the custom as found and the charter-party can be reconciled, as stated by the Chief Baron.

I do not profess to understand the evidence of Mr. Carlisle that in the port of Belfast the term "alongside, always within reach of the ship's tackles," means that the timber is "alongside" anywhere in the dock (600 feet by 580 feet), and may be "within reach of the ship's tackles" anywhere in the dock; nor Mr. Scully's evidence that "within reach of the ship's tackles" has not a well understood meaning. The ship was in the open water of the dock. "Alongside" is a word in ordinary use, and, alike both in common and commercial acceptation, does not necessarily import contact with the ship's side, but does import proximity to the ship's side, more or less. Then the words "always within reach of the ship's tackles" point to an approximately ascertainable distance alongside, within which the ship may hoist the logs aboard when loading, or discharge them when unloading the cargo over her side, by means of her tackles, which are always part of the ordinary gear and equipment of a cargo vessel. It is, I take it, common knowledge that a ship's tackle is a combination of a rope or chain (technically called the fall), working with two or more plies through two or more blocks, one of which blocks is fast to the end of the vessel's boom or spar, and another of which blocks is hooked on to the weight to be lifted or lowered. The end of the rope or chain inboard (called the fall) is either hauled by hand, or, as in the present case, worked round a steam winch, and as it is hauled in, or let out, the tackle, acting vertically, raises or lowers the weight attached to it, much as a crane works on land. This applies similarly to loading or unloading the cargo, the

action of the tackle being similar in either case, and thus "alongside, always within reach of ship's tackles," is a well understood and common expression, signifying proximity to, and within an approximately ascertainable distance from, the ship's side, within which the tackle lifts or lowers the logs; and for this purpose it makes no difference that the tackles in the present case only hoisted the logs from the hold and deposited them on rollers on the deck, from which the logs were then propelled through the ship's side into the water within the defined ascertainable distance. There may be exceptionable cases like *Stephens* v. *Wintringham* (1), where, in the particular circumstances of the case, the expression "alongside, within reach of ship's tackles," must of necessity bear a modified meaning, but no such circumstances are present in this case. The regulations of the dock required that the logs should be rafted when lowered or propelled from the ship into the water: therefore the merchant taking the logs from alongside was bound to comply with the regulations of the dock, which are obviously reasonable, in order to keep cargoes distinct, and the dock free from obstruction. The operation of rafting is proved to be usually effected by men in boats in the dock, termed rafters, who frequent the dock, and are employed for this purpose. They collect the logs unloaded into the water from the ship, and range and secure them with dogs and chains in convenient sized rafts at a distance variously stated as from 40 to 60 feet away from the ship, according to the weather and state of the dock at the time. They are then measured by the official measurer, and then, subject to the freight, their *delivery* to the merchant is complete—they are then in his absolute and final control and dominion, having been in the interim, at his risk and expense, in his actual or constructive qualified possession from the time they were put over the ship's side into the water in the dock, and taken by, or by the authority of, the merchant from alongside the ship within the ascertainable distance of the reasonable reach of her tackles. Evidence of any custom inconsistent with these express terms of the charter-party was inadmissible. I am, therefore, of opinion that the defendants in the present case were liable and bound by contract to defray the

(1) 3 Commercial Cases, 169.

K. B. Div. 1901. NORTHMOOR S.S. Co. *v.* HARLAND & WOLFF. Johnson, J.

expense of rafting and chaining this cargo. As to the second point, Mr. Carlisle was not justified in requiring delivery of the cargo log by log over the side, because that was not according to the contract, even if the offer was made in sincerity. I, therefore, think judgment should be entered for the plaintiffs for the amount in dispute.

Solicitor for the plaintiffs: *Martin J. Burke.*
Solicitor for the defendants: *John G. White.*

J. G. T.

H. L. 1903. Mar. 16, 17, 19. August 6.

LOCAL GOVERNMENT BOARD FOR IRELAND, APPELLANTS; M'KAY, RESPONDENT.

Poor-rate collector—Transfer to County Council—Scheme—Remuneration—Compensation.

APPEAL from the judgment of the Court of Appeal ([1902] 2 I. R. 637), *sub. nom.* R. (M'Kay) *v.* Local Government Board for Ireland.

The Solicitor-General (*Campbell, K.C.*), *Chambers, K.C.*, and *R. Manders*, for the appellants (the Local Government Board).

Healy, K.C., and *Maxwell*, for the respondent.

August 6. THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Macnaghten, Davey, Robertson, and Lindley) discharged the order for a writ of mandamus, and reversed the decision of the Court of Appeal, without costs to either party (1).

Solicitors: *Holmes, Greig, & Greig*, for *T. T. Mecredy*, and *Young, Jackson, Beard, & King*, for *Samuel Jones.*

(1) [1903] A. C. 402; New Ir. Jur., vol. 3, p. 335; 37 Ir. L. T. R. 196.

THE KING (KENNEDY) *v.* THE CHAIRMAN AND JUSTICES OF CO. ANTRIM (1).

K. B. Div.
1903.
Jan. 28.

Licensing Acts—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *s.* 6—*Application for a new license—Adjoining premises—Quarter Sessions—Power of County Court Judge to direct other magistrates on point of law.*

The provisions in sect. 6 of the Licensing (Ireland) Act, 1902, enabling the licensing authority to grant a new license to premises attached to or adjoining premises licensed at the date of the passing of the Act, apply only to the case where the new license includes the premises formerly licensed, and not to the case of a transfer of a license from one set of premises to another.

Per Palles, C.B.: Every magistrate at Quarter Sessions is entitled to form his own opinion on a question of law; but he would be ill-advised if he did not follow the law as laid down by the County Court Judge.

CERTIORARI AND MANDAMUS.

The prosecutor had obtained a conditional order for a writ of *certiorari* to remove, for the purpose of being quashed, an order made at the Annual Licensing Sessions held at Ballymena, in the county of Antrim, on the 4th November, 1902, refusing his application for a certificate for a publican's license for the sale of beer, cider, and spirits, by retail, in a new house, adjoining his present licensed premises at Carnlough, in the county of Antrim, and for a writ of *mandamus* to command the Justices to re-hear and hear and determine the application, on the grounds (as to the *certiorari*) that the order was without and in excess of jurisdiction; that the Chairman was wrong in law in directing the Justices that the said application did not come within the provisions of section 6 of the Licensing (Ireland) Act, 1902; and that the Chairman and Justices had jurisdiction to determine and grant said application under said section.

The affidavit of the prosecutor, upon which the conditional order was obtained, set out that he had been for about twenty years the holder of an ordinary publican's license at Carnlough.

(1) Before PALLES, C.B., and ANDREWS, BARTON, and WRIGHT, JJ.

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That on the 4th November, 1902, he was an applicant for a similar license to be attached to a new and more suitable house erected by him adjoining his existing licensed house, and on the same premises, of which he was tenant, and connected therewith by a continuous wall which surrounded both houses, and separated therefrom by stores used by him in connection with his existing licensed house and a yard, all of which were enclosed by the said wall. That his application came on for hearing on the date mentioned before his Honor Judge Orr, the acting County Court Judge and Chairman, and the Justices of Antrim. That his application was for a license for the new house, on the granting of which he undertook to surrender and extinguish his existing license, and that he relied on section 6 of the Licensing (Ireland) Act, 1902. That he was examined in support of the application. That he held the land on which both houses were erected as a yearly sub-tenant of a Miss Catherine M'Loughlin, who herself held as a yearly tenant until the 31st October, 1901, when she obtained a lease from the head landlord for a term of ninety-nine years, one of the conditions of the lease being that a larger and more commodious house should be erected on the premises at an expenditure of not less than £300. That the deponent had built on the premises within the past year the substantial house, in respect of which he applied for the license, at an expenditure of £500. That the two houses were situated in the same yard, close, or curtilage, by and through which alone the public had access to his licensed house. That he had often sold intoxicating spirits in a shed in this yard, with the knowledge, sanction, and authority of the police, when the accommodation in his house was insufficient. That the sergeant of police gave evidence that the deponent's new house was better adapted than his existing licensed house for the purposes of police supervision, and far superior for the requirements of the licensed business. That the County Court Judge directed the Justices on the point of law that the deponent's application could not be granted, as it did not fall within the provisions of section 6 of the Licensing (Ireland) Act of 1902, and that the application was refused. That the County Court Judge stated that if the license could be granted it would effect an improvement

and would be granted, and that such was the opinion of the Justices. Deponent submitted that the County Court Judge was wrong in law in directing the Justices as aforesaid, and that the Justices had jurisdiction to determine and grant his application under section 6 of the Licensing (Ireland) Act, 1902.

Affidavits were filed by way of cause against the conditional order, setting out that when the application of the prosecutor came before the Quarter Session it was proved that the house in which the prosecutor then carried on, and had for years carried on, his licensed business was situate in the back street of Carnlough, and the house for which a new license was sought was a much larger house and was situate in the main street, and that the two houses were separated by what was formerly one yard, but was now divided by a wall into two parts, making a separate back yard for each house, the yards of both houses adjoining, but being separated by a wall, through which there was no means of communication. That it further appeared from the evidence that the premises for which the existing license was held and the premises for which a new license was sought were wholly distinct premises situate in different streets, and that on the said application the prosecutor undertook, if granted the new license asked for, to surrender the license for the old premises. That the prosecutor was still tenant of the premises for which he held the existing license, and it was not suggested that his tenancy therein had expired or was about to expire, and that no evidence was given that the existing license included any part of the premises for which the new license was sought. That the County Court Judge, after hearing the evidence, directed the Justices that the application was an application for a new license in respect of premises distinct and separate from those already licensed, and that consequently under the Licensing (Ireland) Act, 1902, the Justices had no jurisdiction to grant such an application as the prosecutor sought, and the Justices, acting on the advice of the County Court Judge, then refused the application.

The prosecutor in an affidavit in reply denied that the premises for which the license was sought and the non-licensed premises were distinct and were situate in separate streets, and submitted that the Justices would not so have found had the finding been

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left to them; he asserted that the entire premises were held under one lease, both having their frontages to the same street, and both bounded by the same continuous wall. That the wall separating the new from the old premises was built solely at the suggestion of the police.

The order of the Justices, as appearing by the certificate of the Clerk of the Peace, was as follows:—"The Chairman directed the Justices present that, in his opinion, on the evidence produced, the application did not come within the provisions of section 6 of the Licensing (Ireland) Act, 1902, and that consequently the said application was refused."

The prosecutor now applied to disallow the cause shown, and to make absolute the conditional order.

Healy, K.C. (with him *T. J. Campbell*), for the prosecutor:—

The question whether the new premises were "attached to or adjoining" the already licensed premises so as to be within section 6 of the Licensing (Ireland) Act, 1902, was one of fact, upon which each member of the Court of Quarter Sessions was equally entitled to form his opinion, and the County Court Judge had no authority to direct the other Justices upon the point as a matter of law. The case comes within section 6. The Act draws a distinction between a "license" and a "new license." "New license" is the expression used in section 6. "License" is defined by section 8, but "new license" is not, but is left to the definition in section 37 of the Licensing Act (Ireland), 1874, viz. a license granted in respect of premises in respect of which a similar license has not theretofore been granted. Starting then with the proposition that there is an old licensed house, the new license cannot be granted with respect to that, and the only way in which section 6 can be worked out is to assume the continued existence of the old license for the old premises, and the grant of a new license for the new premises.

The Solicitor-General (*Campbell, K.C.*), and *Hynes*, for Hugh Kane, sergeant R.I.C., an objector below:—

Section 6 of the Statute of 1902 contemplates an extension of premises, and a new license granted for the whole. It does not

apply to a case like this, where what is really sought is a transfer of the license from one set of premises to another; this can only be effected under section 3. The prosecutor himself admits that what he applied for was to have a new license for the new premises, and that he offered to surrender the old license.

Michael J. Dunne, for J. Reside, a private objector.

T. J. Campbell, in reply:—

There was evidence upon which the magistrates might have found that the old license covered the new premises: 35 & 36 Vict. c. 94, s. 77, definition of "premises"; 17 & 18 Vict. c. 89, s. 12; *Reg.* v. *Raffles* (1); *Marson* v. *London, Chatham, and Dover Railway Company* (2).

PALLES, C.B.:—

This case has been argued upon the supposition of the existence of a state of facts wholly different from, and contrary to, that which was presented by the applicant to the County Court Judge. The application at Quarter Sessions was for a new license, that is a license in respect of premises which theretofore had not been licensed. The contention now is that the premises were licensed, and that the magistrates were not permitted by the County Court Judge to determine, as a matter of fact, whether they were included or not in the original license. That view was never suggested to the County Court Judge, and we must deal with the matter as it was presented to him.

I admit that the County Court Judge has no right to attempt to decide questions of fact without taking the opinion thereon of the Justices generally; but I am clear that in this case he did not attempt to do so. He did no more than give his opinion on the question of law which arose on the facts submitted by the applicant. I say nothing as to the right of a County Court Judge to direct the magistrates on a question of law. My own view is that every magistrate is entitled to form his own

(1) 1 Q. B. D. 207. (2) L. R. 6 Eq. 101.

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opinion on such a question, but that he would be ill-advised if he did not follow the law as laid down by the County Court Judge.

The present case may be disposed of in a few words. Undoubtedly it is not within the 3rd section of the Act, and the question, therefore, is, is it within the 6th section? The latter section contemplates that the premises which, after the termination of the proceedings, are licensed, shall include premises previously licensed. The words "licensed premises" in the clause at the end of the section, "in order to render *the said* licensed premises more suitable for the business carried on therein," mean the premises formerly licensed. Even if it could be contended that these words "licensed premises" are not restricted to the formerly licensed premises, but comprehend both them and the premises newly licensed, the effect of the construction would be the same in this case. It is impossible under the section that there can be a transfer of a license from one set of premises to other premises so that the business under the new license shall be carried on on premises wholly distinct from those formerly licensed.

The decision of the Justices must stand, and the conditional order be discharged.

ANDREWS, BARTON, and WRIGHT, JJ., concurred.

Solicitor for the prosecutor: *T. S. M'Allister.*
Solicitor for Hugh Kane: *Sir Patrick Coll.*
Solicitor for J. Reside: *J. Hanna.*

J. G. T.

THE KING (PRUNTY) *v.* THE JUSTICES OF COUNTY LONGFORD (1).

K. B. Div. 1903. Jan. 26. Feb. 2.

Local Government—Schedule to Local Government (Application of Enactments) Order, 1898, *articles* 9 (1), 12 (11)—*Criminal law—Justices—Summary jurisdiction.*

By article 12, sub-article 11, of the schedule to the Local Government (Application of Enactments) Order, 1898, any person who acts "when disqualified" under that Order, is liable on summary jurisdiction to a fine:—

Held, that the sub-article did not apply to the case of a person who, being qualified, was elected guardian of a board of guardians, and acted as such without having taken the declaration required by article 9 of the schedule.

CERTIORARI.

The prosecutor, Wm. Prunty, was convicted by the Justices of the Peace of the county of Longford at Petty Sessions, and fined the sum of £3, with 5*s.* costs, for that he, being a qualified person, was elected or chosen to the office of a guardian of the Longford Board of Guardians, on the 3rd June, 1902, and that having received regular notice of his election, he omitted and failed within ten days from receiving said notice of election to make the declaration required and prescribed by art. 9 (1) of the schedule to the Local Government (Application of Enactments) Order, 1898, and not having made the said declaration within the time prescribed, and having thereby incurred disqualification, he acted and voted when disqualified by that Order, and thereby incurred the penalty provided by art. 12 (11) of the said schedule to the Local Government (Application of Enactments) Order, 1898, to wit, on Saturday, September 20th, 1902, he acted and voted as a guardian of the said Longford Board of Guardians.

The prosecutor having obtained a conditional order for a writ of *certiorari* to remove and quash the conviction on the grounds, *inter alia*, that the penalties for acting as a guardian

(1) Before PALLES, C.B., and BARTON and WRIGHT, JJ.

K. B. Div. 1903. THE KING (PRUNTY) v. JUSTICES OF LONGFORD.

without without having taken the declaration were not recoverable by summary jurisdiction, and that the Justices were wrong in law in holding that the defendant became disqualified from acting as a guardian, the present application was on behalf of the Justices, showing cause against making absolute the conditional order.

The Solicitor-General (*Campbell, K. C.*) (with him *W. F. Kenny* and *Cecil Atkinson*), for the Justices :—

Prunty was properly convicted under art. 12, cl. 11, of the schedule to the Local Government (Application of Enactments) Order, 1898, since he was a person who acted "when disqualified." The failure to take the declaration as prescribed by clauses 1 and 5 of article 9 is a disqualification. The moment the returning officer declares the result of the poll the person elected is in possession of the office; any matter, therefore, subsequent to that which prevents him from acting must be matter of disqualification; having had a qualification it has ceased to exist. Article 11 (6) shows that the provisions in this part of the schedule deal with two classes of cases :—1st. Want of qualification, that is where the person elected never had the right to be a candidate. 2nd. Disqualification, that is where a person duly qualified as a candidate has been elected, and afterwards becomes disqualified, or disqualifies himself from acting by omitting to take the declaration. If disqualification is the proper term with respect to such last named person in article 11 (6), the word "disqualified" must be given a corresponding meaning in article 12 (11).

S. L. Brown, K.C., and *T. J. Smith*, for the prosecutor :—

Art. 9 (1) expressly provides for this very offence of not taking the declaration, and it cannot have been intended that this should also be an offence under article 12 (11), carrying with it the additional penalty imposed by sect. 94, sub-sect. 3, of the Local Government (Ireland) Act, 1898, viz. a disqualification for being elected for seven years. Want of qualification must be distinguished from disqualification. Article 12 is headed "Disqualifications"; it deals throughout with cases of disqualification, and must be taken to be exhaustive of such cases. The prosecutor has done nothing to vacate his office; he still holds it, and votes

and acts at his own risk, the risk of incurring the penalties prescribed by article 11 (4).

[They referred to *The Queen* (*Kenealy*) v. *Nolan* (1); *The Queen* (*Nolan*) v. *Justices of Kilkenny* (2)].

W. F. Kenny, in reply:—

Article 12 cannot be taken as exhaustively specifying every kind of disqualification. It is, no doubt, headed "disqualifications," but it is not drawn with strict logical accuracy, since matters which are want of qualification are included, *e.g.* in clause 4 (*a*) infants and aliens are dealt with. [He referred to sect. 23, sub-sect. 4, of the Local Government (Ireland) Act, 1898; article 9 (1), article 10 (3), article 11 (1), (4), and (6), of the schedule to the Application of Enactments Order, 1898.]

Cur. adv. vult.

Feb. 2.

PALLES, C.B.:—

This was a motion for a *certiorari*, to bring up, for the purpose of being quashed, a conviction which purported to be made under article 12, sub-article 11, of the Application of Enactments Order, which subjects to a fine not exceeding £20 any person "who acts when disqualified or votes when prohibited under this Order." The question was, whether the defendant had acted "when disqualified" within the meaning of this article.

The facts are that he, being duly qualified, was elected as a guardian of the poor, and acted as such guardian without having taken the declaration required by article 9. The question is, whether a person duly elected is "disqualified," within the meaning of the article in question, by reason of his not having made the declaration.

The question is one of some importance, as sect. 94, sub-sect. 3, of the Act of 1898 renders any person who is convicted of acting when disqualified incapable, for a period of seven years after conviction, of being elected or of being a member of the same or any other council, board, or commissioners.

In my opinion the applicant was not so disqualified, and consequently the conviction ought to be quashed.

(1) 6 Ir. Weekly Rep. 164. (2) *Ib.*

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THE KING (PRUNTY) v. JUSTICES OF LONGFORD.

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The Application of Enactments Order, in many of its provisions, draws a clear distinction between "disqualification" and "want of qualification." As one instance, out of many which might be mentioned, I refer to article 11, sub-article 6.

The declaration, the omission to make which is relied on, is prescribed by article 9, sub-article 1:—"Every qualified person elected . . . to a corporate office in a . . . board, unless exempt under this article, or otherwise by law, either shall accept the office by making and subscribing the declaration required by this Order within ten days, . . . or shall, in lieu thereof, be liable to pay to the . . . board a fine of such amount, not exceeding £50, . . . as the board by by-law . . . determine."

Then article 11, sub-article 4, provides that "If any person acts in a corporate office in a . . . board without having made the declaration by this Order required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, he shall for each offence be liable to a fine not exceeding £50, recoverable by action."

In my opinion this article deals, not with disqualification, but with want of qualification. The defendant was, no doubt, qualified to be elected; but he never was qualified to act. He did an act, not when he was disqualified, but when he was not qualified. The penalty he thereby incurred is the large one prescribed by article 11, sub-article 4, and not the smaller one mentioned in article 12, sub-article 11; and I am quite clear that those penalties were not intended to be cumulative.

The conviction must be quashed.

BARTON and WRIGHT, JJ., concurred.

Solicitor for the prosecutor: *C. J. P. Farrell.*
Solicitor for the Justices: *Sir P. Coll.*

J. G. T.

DAVID O'KEEFFE *v.* PATRICK WALSH, JOHN CONDON, AND OTHERS (1).

(1901. No. 8635.)

K. B. Div. 1903.

Feb. 13, 14, 16, 17, 28.

Appeal.

June 4, 5.

Practice—Parties—Joinder of defendants—Separate causes of action—Claim for damages—Action of conspiracy—Liability of separate defendants joining conspiracy at different dates—Severance of damages—Jurisdiction—R. S. C. Ir., Order XVI., Rules 4 and 5; Order XVIII., Rule 1.

Where an action is brought against a number of defendants jointly for an illegal conspiracy, the fact that separate defendants joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, as joining separate causes of action against separate defendants, there being in substance only one cause of action, namely, the conspiracy to injure. In such a case the jury may differentiate between, and assess separate damages against, separate defendants, according to the respective dates when such defendants became members of the conspiracy.

Semble: A party to a conspiracy is not liable for the damage flowing from the conspiracy before the date of his joining it; but acts done in furtherance of the conspiracy prior to that date may be given in evidence against him, for the purpose of showing the origin, nature, and objects of the conspiracy.

One of the defendants having appealed:—

Held, by the Court of Appeal, (1) that on the facts he was liable with his co-defendants; (2) that the segregation of damages was right.

NEW TRIAL MOTION.

This action was brought by the plaintiff against ten defendants, to recover the sum of £20,000 damages for an illegal conspiracy. The statement of claim alleged that the defendants unlawfully and maliciously procured certain persons, who had been and were willing to deal with the plaintiff in the ordinary course of his trade, and to sell goods to and buy goods from the plaintiff, and to work for him, not to deal with the plaintiff, and

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

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not to sell goods to or buy goods from him, and not to work for him; that the defendants unlawfully and maliciously conspired and agreed amongst themselves, and with other persons unknown to the plaintiff, to procure and induce such persons not to deal with the plaintiff, and that the defendants unlawfully and maliciously procured or conspired to procure persons to break contracts, and induced or conspired to induce persons not to enter into contracts, with the plaintiff.

The defence of the defendant Condon, who appeared and was defended by separate counsel and solicitor, traversed the various allegations in the statement of claim.

The material facts were shortly as follows:—The plaintiff was, up to the end of the year 1898, a leading trader in the town of Tallow, Co. Waterford, his business as a buyer and exporter of grain and timber and an importer of coal embracing the country within a radius of several miles from his establishment. On the 22nd February, 1898, the plaintiff became the purchaser of an evicted farm, of which he got possession in February, 1899. At this time there were no branches of the United Irish League in the district of Tallow; but in the year 1899 branches were formed in Tallow and in the neighbouring district of Conna, from which the plaintiff mainly drew his corn supplies, the nine defendants, other than Condon, being the local leaders of the movement. It was proved that meetings of the League were held, at which the plaintiff was denounced; a system of picketing was introduced, and, in consequence of the resulting boycott of the plaintiff, his trade was ruined. In June, 1900, the plaintiff, for the purpose of effecting a settlement, paid a sum of £300 to the former owners of the evicted farm, whereupon his trade revived to some extent; but the Tallow branch of the League subsequently refused to recognize the settlement, the plaintiff was again denounced, and his trade became extinguished. There was no evidence as to the exact date when the defendant Condon became a member of the League, but it was proved that he was president of the Conna branch in September, 1900. It was also proved that in December, 1900, after the renewal of the boycotting of the plaintiff in Tallow, a resolution of the Conna branch was passed, declining to identify the Conna branch with the Tallow branch, whereupon Condon

gave notice of motion that this resolution should be rescinded, which was subsequently done.

The further facts of the case will appear from the judgments delivered in the Divisional Court.

The action was tried before the Lord Chief Baron and a special jury of the county of Dublin on the 10th, 11th, and 12th November, 1902.

No evidence was offered on behalf of any of the defendants, and, at the close of the plaintiff's case, counsel for Condon asked for a direction on the grounds (1) that there was no evidence proper to be submitted to the jury in support of any of the causes of action alleged in the statement of claim as against him; (2) that the action being a joint action against all the defendants, and the damages (if any) being one indivisible sum, any verdict against the defendant Condon, jointly with the other defendants, would include damages as against Condon for injury to the plaintiff's trade and business by the conspiracy at periods when there was no evidence that the defendant Condon was a party to or member of the conspiracy.

The learned Judge refused to withdraw the case from the jury, and left to them the following questions, the answers to which are appended :—

1. Did the defendants, or any one or more, and if so which, of them, agree to induce persons not to deal with the plaintiff? *Answer*—Yes; all of the defendants.

2. If so, did such defendants so agree maliciously? *Answer*—Yes.

3. Did such defendants, in fact, induce persons not to deal with the plaintiff? *Answer*—Yes.

4. If so, did such inducement cause loss to the plaintiff? *Answer*—Yes.

5. If so, assess the damages (*a*) upon the supposition that the defendant Condon is responsible for all the damages; (*b*) upon the supposition that the defendant Condon is only responsible for damages accruing from the action of the defendants after he joined the conspiracy. *Answer*—£5000 up to the settlement of

K. B. Div. 1903.

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20th June, 1900, and £500 after settlement, when we consider that John Condon joined the conspiracy.

The jury, in answer to a further question from the learned Judge, said that the £500 was in addition to the £5000 against the defendants other than Condon, but that they gave no damages beyond the £500 against Condon in any event.

Counsel having been heard as to the effect of these findings, the following judgment was delivered on the next morning by PALLES, C.B.:—

I have considered this case as well as I could since last night. Different minds will take different views of the same question, but I confess that when I came to consider it, and looked at the rules, and thought of the object of the rules, my opinion agreed with Mr. O'Shaughnessy that the case was hardly arguable. But as it may be that others may differ from my opinion, I shall shortly state the grounds upon which I have come to it.

I first wish to clear the ground, and I shall take first the case of *Dawson* v. *M'Clelland* (1). It is a decision of our own Court, and of the Court of Appeal. Of course it binds me, and I should bow to its authority, even if I differed from the reasoning in it, which I do not. But what did it decide? It decided that if there was one single tort, committed by a number of joint *tort-feasors*, you could not in one action, framed as that was, and I should like to add, framed in any way in which it could be framed, assess separate damages against the separate *tort-feasors*. Now why is that? The gist of the decision is to be found in the judgment of Lord Justice Holmes, and I think it is hinted at in the judgment of Lord Justice Walker. It is that the rules under the Judicature Act, while they alter procedure, do not alter liability, and that the liability of several joint *tort-feasors*, when sued in one action, is a *single* sum for a *single* wrong inflicted by *all*, and consequently to be assessed against all. In respect of this sum there is no contribution between the defendants, as they are *tort-feasors*. But every one of the joint *tort-feasors* sued is entitled to see that the damages shall be assessed jointly against so many

(1) [1899] 2 I. R. 486.

of them as are included in the writ and found guilty, that he may be discharged from liability if the plaintiff think fit to levy his damages from another or others of them.

So far as *Dawson* v. *M'Clelland* (1) is concerned, I do not think it touches this case, the broad distinction that I rely upon being that there there was but one *single* indivisible act, and several persons liable for that act, and brought before the Court as liable for it.

Now I take the English cases. The two that have been mentioned are of great authority, each being a decision of the House of Lords. *Smurthwaite* v. *Hannay* (2) was a case of misjoinder of causes of action and misjoinder of plaintiffs. In the one action were united claims by several plaintiffs—claims which were separate and distinct, and could not regularly be joined in one action. I quite understand that decision; there was no Court in our previous system of judicature in which a suit of such a composite nature could have been sustained; and, giving a fair construction to the rules, it was rightly held that separate plaintiffs, who complained of separate transactions, wholly distinct, and having no connection with one another, could not join in one action.

In *Sadler* v. *The Great Western Railway Company* (3) there were claims for damages against two or more defendants in respect of several liabilities for separate damages, and it was held that they could not be combined in one action. In some of the judgments in these cases reference is rightly made to the general object of these rules. There had previously been separate Courts with separate courses of procedure, separate modes of pleading, and wholly separate forms of judgment. In the Common Law Courts, as I understand the law, in an action against several defendants for tort there could have been but one single judgment for one single sum against all the defendants, or against some only, with an acquitting of the others. But such a thing at Common Law as a judgment in one action for tort against three defendants for one sum, and against a fourth defendant for another sum, I care not what were the natures of the causes of

(1) [1899] 2 I. R. 486. (2) [1894] A. C. 494. (3) [1896] A. C. 450.

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action, was impossible. I think that that result arose from the old Common Law rule in relation to the single character of a judgment in a common law action. Therefore, if this case had been tried before the Common Law Procedure Acts, it would have been a matter of course to put the plaintiff to his election as to the judgment he would take, whether it would be one against nine of the defendants for £5500, acquitting the tenth, or one against the ten for £500.

So far I have dealt with actual decisions. I now come to the real matter in controversy here—the effect of the modern rules. The two which I have mentioned, and upon which I intend to base my judgment, are Rules 4 and 5 of Order XVI. Rule 4 is as follows:—"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, *according to their respective liabilities*, without any amendment." Rule 5 is as follows:—"It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or *as to every cause of action included* in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

I have mentioned my view of the law, before the Common Law Procedure Acts, as to a common law action in respect of the matters in question here. But it is plain that even before the Judicature Act a suit in respect of the matters here before me could have been entertained in the Court of Chancery. It is immaterial to discuss whether, in such a case, the bill would have been directed to stand over to abide the result of the trial of an action at law, or whether an issue would have been directed to a Common Law Court to try the question of fact, the existence of the conspiracy, or whether a jury would have been sworn before the Judge himself, or whether the Judge himself would, without a jury, have tried the question. I do not go into the matter of procedure, but it is impossible to deny that a bill would have lain in the Court of Chancery, for an injunction to prevent the

ten defendants from pursuing the course of conduct which it was the object of this conspiracy to accomplish, and that, upon the finding of the jury here, the Court would have had jurisdiction, in such a suit, to grant an injunction against each of these ten defendants not to persist in this boycotting conspiracy. But is that the only relief the Court of Chancery would have had power to grant in such a suit? As a general rule the practice of that Court was to grant complete relief so far as its methods of procedure enabled it to do, and there is no doubt that that Court was never fettered to decreeing the same one sum against all defendants. Its practice was to mould the relief to the exigencies of the case and to the respective liabilities of the parties, even in cases where the fact from which the Court derived its jurisdiction was an act of wrong. Thus, where minerals were fraudulently obtained by underground working, accounts of profits might be directed against different parties for non-identical periods. I do not enter into the question whether, in such a suit as I have mentioned, the Court of Chancery would have given relief by way of damages. It is unnecessary to do so, as, if it would not, the sole reason for denying such relief would have been that relief by way of damages was, at least before Lord Cairns' Act, deemed hardly appropriate to that Court. This Court, however, has under the Judicature Act, even independently of the rules made thereunder, both the jurisdiction of the old Common Law Court to give relief by way of damages, and that of the Court of Chancery to distribute its relief between several defendants according to their respective liabilities, and these two jurisdictions combined enable it, in my opinion, to distribute pecuniary damages in cases in which, by doing so, the Common Law rule as to the joint liability of tort-feasors is not encroached on. As the right to pecuniary damages for past loss is independent of an injunction, I hold it immaterial that an injunction has not been prayed. Were it necessary, I should give liberty to amend the prayer, and grant an injunction. I deem it, however, unnecessary to do so. It follows that I am of opinion that judgment can be given in accordance with the verdict.

It is then said that, in addition to the misjoinder of defendants, there is a misjoinder of causes of action. In my opinion it is

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impossible, upon any construction of the rules, to suggest that what, in the Court of Chancery, formerly, would have been the subject of a single suit, must now be split up into separate suits. The rules of the Court of Chancery in respect of misjoinder of causes of suit were very strict. I have no doubt that, as regards plaintiffs, one of the objects of Order XVI. was to render the practice more elastic. Because the fact that you were unable to join two inconsistent suits in the same bill rendered it impossible for you to sue for two plaintiffs, one of whom upon one construction or upon one state of facts would have been entitled, and the other upon another construction or another state of facts. That would have been a misjoinder not of causes of suit, but of plaintiffs, and the suit would have been dismissed as a matter of course. If anybody wishes authority for that, it will be found in the well-known case of *Fulham* v. *M'Carthy* (1) in the House of Lords in 1848.

Therefore, I hold that the subject-matter of a suit, which could have been maintained in the Court of Chancery under the old system, can now, under the Judicature Act, be the subject of *one* action, and that any relief that could have been obtained in the Court of Chancery formerly in that suit, can now be obtained in the King's Bench Division.

It is wholly erroneous to say that there are here two separate and independent causes of action. In its nature and character, it is *one* conspiracy against the plaintiff, carried on by nine persons from its commencement, which obtains the adherence of a tenth person during its progress, and all ten proceed in the *same* conspiracy down to the time that the writ is issued. I think that the plaintiff is entitled to relief against all those persons in respect of this one transaction, in respect of matters all of which could have been given in evidence in an indictment against them all, a transaction in respect of which, had this statement of claim been an indictment, the verdict here would have amounted to one of guilty against all. Under circumstances of that description, when there are such rules as I have quoted, I cannot bring myself to believe that I should be justified in refusing this

(1) 1 H. L. Cas. 703.

plaintiff relief against any of the defendants, and I certainly shall not do so.

I wish now to treat the matter on a separate ground. I have already alluded to the single character of the whole matter, reducing it to the one transaction, as to which, in former times, one suit could have been maintained in the Court of Chancery in respect of the entire matter. I wish now to mention another view, though it is upon the first I have mentioned that I intend to rest my judgment. I have already said that *Dawson* v. *M'Clelland* (1) is distinguishable, because the action there was in respect of one single tort. Now, this action is to be differentiated from a prosecution for the same subject-matter in this —that in a prosecution the crime is the agreement, the crime is complete, although the conspirators do not proceed to carry their design into operation—whereas from the earliest times it has been held (and I especially refer to 1 Williams' Saunders, p. 272, on the subject) that in a civil action the cause of action is not the conspiracy, but the damage resulting to the plaintiff from the acts done in pursuance of the conspiracy.

The importance I attach to this is that, although a conspiracy is a single thing inseverable (see *O'Connell's Case* (2)), it is relied on here not as the cause of action, but (1) as evidence for the purpose of making each conspirator liable for the acts of his co-conspirators as his agents, and (2) for the purpose of showing the wrongful character of the acts; but those acts are the causes of action. What I have to deal with are those acts, the acts done in pursuance of the conspiracy, and, in point of law, as well as in the distinct words of the statement of claim (which is extremely well framed), those causes of action are *successive* acts upon successive days, each of which acts being, according to my view, wrongful against the plaintiff, constitutes a *separate cause* of action by him against the persons responsible for it.

Each count is, therefore, divisible and distributable, exactly as is a count charging a number of trespasses on successive days. That being the charge, it is settled that if all the defendants are acquitted in such an action of part of the trespasses alleged,

(1) [1899] 2 I. R. 486. (2) 11 Cl. & F. 155.

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there can still be judgment against them as to the other part. It is the same if some, but some only, of the defendants are acquitted as to the entirety in a single action, there can be judgment for the plaintiff against the others. The distinction between these two cases, taken together, and the present case, is one of the merest form, viz. that there is but one writ instead of two. Were there two, the result would be that judgment would go in one action in respect of the wrongful acts to the 18th June, 1900, against nine defendants with £5000 damages, and Condon as to those acts would be acquitted; and in the second action, that for the wrongful acts committed after the 18th June, there would be judgment against the ten defendants with £500 damages. Thus the proposition that I am asked to adopt is that in one action against ten, charging several wrongful acts, in their nature separate, as being done by the ten, there cannot be judgment against the ten as regards part, and against nine of those ten as regards the other part.

I do not think the rules lead to that conclusion. I do not think there is any word in any of the judgments referred to that necessarily leads to that conclusion, and in my opinion it would be against the spirit of the Act and the rules so to hold. It is unnecessary, however, to decide so broad a proposition, for however that may be in respect of separate and independent causes of suit, such, for instance, as an act of trespass to land by eight or nine defendants, and an independent and wholly disconnected cause of action against them in respect of an assault and battery—however it may or may not be, in respect of transactions of that description that are wholly unconnected, I hold that there is in this particular case such a connection between all the causes of action as differentiates it from the general principle and prevents the question arising. I therefore give judgment against the nine defendants in respect of the causes of action prior to the 18th June, 1900, for £5000 damages and costs, and against the ten in respect of the acts done after the 18th June, 1900, for £500 damages and costs, and of course judgment with costs for Condon as to the acts of which he has been acquitted.

There arises another question. I do not want the Taxing Master to be involved in the immense difficulty that he would otherwise

have in trying to separate the costs which are to be attributable to one class of the causes of action from those attributable to the other. I tried a case some few years ago, in which it was necessary for the Taxing Master in a claim and counterclaim to make a distribution of costs in that way. The Judges had some years before officially informed the Taxing Masters that if they found any difficulty in taxing the costs under such circumstances, on requisition made to the Judge he would give any assistance in his power. Six months after I had tried the case, which occupied some six days, and after everything had passed from my recollection, I received a requisition involving questions as to, I think, twenty different matters. I went through all my notes, and I think I had more trouble in reference to that distribution of costs than I had in trying the case.

To prevent any such difficulty in the present case, I shall state to the Taxing Master that, in my opinion, every witness examined in the case was a necessary witness upon each class of the causes of action, and that, I hope, will save him the necessity of inquiring further into these matters. So that as far as the costs of the trial are concerned, he will appropriate one-half of them to the cause of action as to which Condon has been acquitted, and the other half to the other causes of action.

J. L.

The defendant Condon now moved to have this judgment and verdict set aside as against him, and that the verdict and judgment should be entered for him, or for a new trial.

Matthew J. Bourke, K.C., *Redmond Barry, K.C.*, and *George C. Green*, for the defendant Condon:—

There was no evidence implicating Condon in the conspiracy to injure the plaintiff. The avowed and declared object of Condon's notice of motion to rescind the resolution of 2nd December, 1900, was to preserve unity between the Conna and Tallow branches. The jury were not at liberty arbitrarily to construe that as a joining with the Tallow League in the boycott of plaintiff, or to attribute to Condon a different motive from the one he publicly expressed. That declaration of his qualified and explained the notice of motion. Even if this notice of motion

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established Condon's complicity in the conspiracy, it would still leave him simply a party, and only liable criminally in the absence of some act done thereafter in furtherance of the conspiracy causing damage to the plaintiff. There was no evidence of any such subsequent act. Therefore, there was no cause of action; as a conspiracy itself is not actionable; it is the wrongful acts done in pursuance of it, and causing damage, that constitute the cause of action: *Saville* v. *Roberts* (1); *Mogul Steamship Company* v. *M'Gregor* (2): *Quinn* v. *Leathem* (3).

Apart from the question of evidence, the judgment against Condon is bad in law. The action was one for a joint tort, against joint *tort-feasors*; framed as such; conducted as such; and fought on that basis to the end. It must accordingly be dealt with on that basis; and *Dawson* v. *M'Clelland* (4) decides that there can be no severance of damages in such an action. Conspiracy is no exception to the general rule. If, on the other hand, there were separate and distinct causes of action, one against nine of the defendants for the damage done down to the 20th June, 1900, and the other against the ten defendants for the damage done after that date, the action was wrongly constituted in law. It is for these respective causes of action, as separate causes of action, that the verdicts and judgments have been taken and entered. Separate and distinct causes of action against separate defendants could not have been joined in one action prior to the Judicature Act: Common Law Procedure Act, 1853, sect. 54. That law so laid down in 1853 is retained under sections 26 and 67 of the Judicature Act, where not expressly altered. General Order XVI., Rr. 4 and 5, does not authorise such joinder. That Order deals only with the parties to an action, and not with the joinder of causes of action: *Smurthwaite* v. *Hannay* (5). The House of Lords there decided that separate causes of action against several defendants are not admissible, even though they arise out of the same transaction. *Dawson* v. *M'Clelland* (4) decides that Order XVI. does not alter the previously settled law in Ireland. The plaintiff in *Sadler* v. *The Great*

(1) 1 Lord Raym. 374.
(2) 23 Q. B. D. 598.
(3) [1901] A. C. 495.
(4) [1899] 2 I. R. 486.
(5) [1894] A. C. 500.

Western Railway Company (1) sought to make several defendants liable for damages for separate torts in one action; but the Court of Appeal held that the action could not be maintained. Rule 4 was there relied upon, but the Court held the joinder inadmissible. Rules 4 and 5 of Order XVI. were also relied upon in *Gower* v. *Couldridge* (2) as justifying the joinder of a claim in respect of a tort against some of the defendants, with a claim in respect of a separate tort against all; but the argument was rejected by the Court, as was the contention that the causes of action were not independent, but arose out of the combined act of the defendants. That Order XVI., Rr. 4 and 5, relates only to the joinder of parties, and not to the joinder of causes of action, was re-affirmed in *Thompson* v. *London County Council* (3).

Reliance is placed upon the practice in Chancery actions of giving separate relief against several defendants. But the Court of Chancery had no jurisdiction to entertain an action like this for unliquidated damages for tort: *Secretary of State for War* v. *Studdert* (4). Further, this was an action framed and conducted as a Common Law action—fought to the end as a Common Law action. As it now stands it is a Common Law action—an action of tort for damages—and the defendant Condon is entitled to have it dealt with on that basis. The practice of binding parties by the conduct of a suit should not be departed from. And where a party takes a legal objection grounded on the nature and constitution of the action as brought and fought, it is not right to treat the action as if it had been differently framed and fought, and to do this for the purpose of overcoming a legal objection. Even if an injunction had been claimed, the action could not have been brought in the Chancery Division: *Prudential Assurance Company* v. *Knott* (5); *Temperton* v. *Russell* (6); *Sadler* v. *Great Western Railway Company* (1). And down to this moment counsel for plaintiff do not profess to claim an injunction. The action was throughout, and still continues, one conversant only with a claim for compensation for past loss. Even if an injunction had been claimed in the present action, it would have remained a Common Law action with all its incidents; and separate causes

(1) [1896] A. C. 450.
(2) [1898] 1 Q. B. 348.
(3) [1899] 1 Q. B. 840.
(4) [1902] 1 I. R. 240.
(5) L. R. 10 Ch. 142.
(6) [1893] 1 Q. B. 438.

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of action against separate defendants could not have been joined. "I am not aware," says Lord Halsbury in *Sadler* v. *Great Western Railway Company* (1), "that the Judicature Act, or any principle that has ever been acted upon or affirmed in any Court, has said that you may combine several separate and distinct causes of action. What we used to know as a Common Law cause of action, and what *is* a Common Law cause of action, must still remain so, and as such is open to the incidents of a cause of action, so as to prevent that which is a separate cause of action being made a joint cause of action." There an injunction was actually claimed. Yet the House of Lords held that neither that fact, nor the analogy of the Chancery practice, warranted the combining of the separate causes of action.

Frankenburg v. *Great Horseless Carriage Company* (2) is clearly distinguishable. There was in that case one cause of action, namely, the issue of a fraudulent prospectus, from which sprung different individual liabilities for the wrong done. *Kent Coal Company* v. *Martin* (3) was dealt with on the same basis of comprising but one and the same cause of action. There is no analogy between such an action and the present one, where it is plain the plaintiff has obtained separate verdicts, and judgments for separate damages, against separate groups of defendants, for separate and distinct torts, although he sued for a single joint tort. In any event there was a miscarriage of justice owing to the time at which it was decided that several findings should be taken.

The Solicitor-General (*Campbell, K.C.*), *T. L. O'Shaughnessy, K.C.*, and *E. Morphy*, for the plaintiff:—

The evidence against the defendant Condon is overwhelming.

The plaintiff's cause of action complains of one conspiracy to injure, extending over a lengthened period, and receiving an accretion of new members at different times. We contend that it was competent for the plaintiff to join all such members as defendants in one action, and to have, if necessary, separate damages assessed in respect of each. The case is analogous to an action against a partnership for continuing trespass, or for negligence extending over a number of years causing damage to the plaintiff's property. Could it be contended that separate

(1) [1896] A. C. 453. (2) [1900] 1 Q. B. 504. (3) 16 *Times* L. R. 486.

damages could not be assessed against members of the partnership who joined the firm at different times, according to the respective dates when each became liable? The principle contended for was recognised in *Jackson* v. *Munster Bank* (1), where one of the directors was held liable from the date when he became aware of the breaches of trust: see also *O'Brien* v. *Mitchelstown Loan Fund Society* (2).

In the case of a conspiracy to injure, each person who joins is either liable for the total loss occasioned by the conspiracy, or at least for any portion of such loss as could be attributed to the acts of himself and his colleagues after his joining it. We submitted at the trial before the Lord Chief Baron, that Condon was primarily liable for the entire loss occasioned to the plaintiff, and we do not retire from that position now. Bayley, J., in his charge to the grand jury in *Watson's Case* (3), says:—"Provided a man once comes into the common purpose and design, every previous act with a view to that purpose and design, and every subsequent act, is as much his act as if he had done it himself." Accordingly, once the jury found that Condon was a member of the conspiracy, he was in point of law a party to every act done in furtherance of the conspiracy, whether before the date of his joining or afterafterwards, and civilly, as well as criminally, liable for the consequences. The plaintiff could have applied to have the verdict entered against each of the defendants for the entire sum, and Condon should not now be heard to say that because the jury took a lenient view of his case, and only onerated him with damages from a certain date, he should escape altogether.

Dawson v. *M'Clelland* (4) was rightly decided, but does not affect the judgment in the present case. The act there complained of was one and the same, one joint tort, and the damages flowed from the act itself *uno ictu*. Separate damages could not be assessed in such an action, but the present case is one of a different character, where there was a continuing tort, and the damages accrued from day to day according as the conspirators, who *ex concessis* might have joined at different periods, succeeded in their unlawful designs.

(1) 15 L. R. Ir. 356.
(2) [1903] 1 I. R. 282.
(3) 32 St. Tr. 7.
(4) [1899] 2 I. R. 486.

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Smurthwaite v. *Hannay* (1) and *Gower* v. *Couldridge* (2) are distinguishable; in each the plaintiff sought to make separate defendants liable in respect of several causes of action, without any connecting link between them. Here there is but one cause of action, viz. the conspiracy to injure, as in *Frankenburg* v. *Great Horseless Carriage Company* (3) there was only one cause of action in the wide sense, viz. the issuing of a fraudulent prospectus. The judgment of Lindley, L.J., in the latter case rules the present.

Prior to the Judicature Act, separate judgments could not have been given against the defendants, but Rules 4 and 5 of Order XVI. are explicit, and justify the course adopted at the trial. Rule 4 directs that judgment may be given against such one or more of the defendants as may be liable "according to their respective liabilities." Whether the defendant Condon was liable for the entire damage caused by the conspiracy, or for that resulting after he joined, his case comes within the very language of this rule.

[THE LORD CHIEF JUSTICE: Is that rule conversant solely with a single cause of action?]

The Solicitor-General: That would be to narrow it to an extraordinary degree, but the present is a single cause of action, which the argument of Mr. Bourke confounds with the separate liabilities of defendants arising under the one cause of action. Rule 4 must be read in conjunction with Rule 5, which expressly states that every defendant need not be interested in the same measure of relief. That rule contemplates a single cause of action where the relief claimed is different as regards different defendants. It is the damages that are the relief claimed, and the rule is not confined to cases where different classes of relief are sought for. The later words of the rule show that the opening words cover this case. Even if the present action could be held to include more than one cause of action, Order XVIII., Rule 1, would have empowered the Judge at the trial to order separate trials of such causes of action as he should deem expedient. No such order was made or asked for.

That the action could have been brought in the Chancery

(1) [1894] A. C. 494. (2) [1898] 1 Q. B. 348. (3) [1900] 1 Q. B. 504.

Division and the appropriate remedy granted there, is clear: *Lyons* v. *Wilkins* (1), *Jackson* v. *Munster Bank* (2). Consequently, now that the Judicature Act has abolished the distinction between Common Law and Chancery cases, and the Court in each case has full jurisdiction over every cause (*Sadler* v. *Great Western Railway Company* (3)), it follows that the judgment of the Lord Chief Baron is correct in point of law, and we submit that it should not be disturbed.

Redmond Barry, K.C., in reply.

Cur. adv. vult.

Feb. 28.

LORD O'BRIEN, L.C.J.:—

The action in this case complained of a conspiracy to inflict loss and damage upon the plaintiff by boycotting him, and was brought against the ten defendants whose names are set forth in the statement of claim, including that of John Condon. A verdict was found against nine of these defendants, excluding Condon, for £5000 for their participation in the conspiracy up to 20th June, 1900, and against the whole ten defendants, including Condon, for the additional sum of £500 from June, 1900, down to the bringing of action, and judgment was entered accordingly. Of all the defendants Condon alone impeaches the propriety of the verdict and judgment. He alone complains—he alone is represented here, and his complaint is this: 1st, that there was no evidence to show that he was implicated in the conspiracy; and, 2nd, that the separate assessment of damages for £500, which were awarded against him in conjunction with the other defendants, was not justifiable in point of law—that there could be no separate assessment of damages, and that therefore the verdict and judgment were not warranted in law, and should be set aside. Counsel principally relied upon a decision pronounced in this Court and in the Court of Appeal in the case of *Dawson* v. *M'Clelland* (4). I will deal with the objections in the order in which they were made:—1st. That there was no evidence to implicate Condon. Mr. Bourke in his opening statement argued that, however

(1) [1899] 1 Ch. 255.
(2) 15 L. R. Ir. 356.
(3) [1896] A. C. 450, at p. 453.
(4) [1899] 2 I. R. 486.

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malignant was the action of the Tallow branch of the United Irish League, the Conna branch of that League of which Condon was a member, and for some time president, was in no way identified with it; that the vast injury that was done to the plaintiff was due to the malignant action of the Tallow branch exclusively; that there was no common action between the branches in the persecution and boycotting of the plaintiff; that however guilty Tallow was, Conna was blameless, and that Condon, one of its members, and some time its president, shared its immunity from blame. This was indeed a courageous proposition on the part of the defendant's counsel, having regard to many facts in the case, but especially one. The Rev. Mr. Morrissey brought forward in the Conna branch a resolution purporting to dissociate that branch from the Tallow branch in the boycotting of O'Keeffe. This resolution was carried, and Condon, who is said to be innocent, gave notice of motion to rescind it, and succeeded in procuring its rescission—that is to say, he successfully frustrated Father Morrissey's effort to dissociate the Conna from the Tallow branch in the boycotting of O'Keeffe.

There was an effort to prove that Father Morrissey's resolution and Condon's resolution rescinding it dealt with something other than the boycotting of O'Keeffe—some mysterious bickering, the precise nature of which the witnesses could not be got to divulge on the ground that, as they alleged, it would criminate them to do so. The evidence, however, of M'Auliffe and Flynn, especially that of the former, disposes of this very palpable contrivance to escape responsibility. The jury had all this before them. They had also before them the fact that Condon at the earlier stages of the boycotting had refused to deal with O'Keeffe, that the Conna district, from which he derived his main supplies of corn, had ceased to deal with him, the fact also that Robert O'Brien, the secretary of the Conna branch, of which Condon was a member and sometime president, habitually attended the meetings of the Tallow branch, and, above all, Collander's evidence, upon which we are informed the Lord Chief Baron laid special stress. It appears that there was an appeal to a general meeting of the executive at Cappoquin, in West Waterford, as to the action of the Tallow branch in expelling Parker and Keniry because they

were parties to the settlement which took place in June of 1900. The resolution proposed at that executive meeting was as follows:—"That the West Waterford executive of the United Irish League hereby endorses the action of the Tallow branch in the action they have taken in the suspension of Messrs. Parker and Keniry from the committee."

This resolution was carried, and the action of the Tallow branch in suspending Keniry and Parker until they apologised for their conduct in relation to the settlement was affirmed. Now, it was with reference to this that Collander, who was an executive officer, swore that "it would be the duty of Conna to keep up the work; the better the remedy, the quicker it should be carried out. It is part of the rules of our organization that once resort has been had to a general meeting of the executive, the decision becomes constitutional." Collander added, "that it was the duty of Conna after the Cappoquin meeting to boycott O'Keeffe." This evidence was all-important, especially coupled with the fact that the Conna districts, the main source of the corn supply, again ceased sending in corn to the plaintiff. After the attempted settlement of June, 1900, these districts sent in corn for a time, but after the recrudescence of the operations of the conspirators, they again ceased sending in the corn. The jury had also before them that the minutes of the meetings were destroyed by Collander, and that, notwithstanding all this, Condon, who was in Court throughout the trial, under the eye of the jury, was not produced. There was, in my opinion, abundant evidence to connect Condon with the conspiracy, in accordance with the findings of the jury; and though they did not find that he was implicated in the conspiracy from the beginning, still it was competent for them to connect him with the recrudescence of the action of the conspirators immediately after the settlement of June was rendered abortive. He had before that time refused to deal with the plaintiff, and he had many interviews with James Walsh, the prime mover in the Tallow branch, in all the mischief and damage that was done; and shortly after the breakdown of the settlement in June there was the meeting of the West Waterford executive, and later again, the resolution which he carried, rescinding Father Morrissey's resolution dissociating the branch from the action of the Tallow

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branch with reference to the boycotting of O'Keeffe. Looking at the whole of the evidence, it was, in my opinion, quite competent for the jury to say that Condon was implicated in the conspiracy from the time mentioned, from the frustration of the settlement, and that everything that followed what I have described as the recrudescence of the conspiracy had the sanction and approval of Condon, and was promoted by him in conjunction with the other defendants.

I shall now proceed to deal with the second question. Is the record right in point of law? Was it legally correct to have in a single action at the Common Law side a verdict for £5000 against nine of the defendants down to the 20th June, 1900, and a verdict for £500 against the same nine defendants and Condon (ten defendants in all) from 20th June down to the commencement of the action? The question is an interesting one to lawyers, and, in my opinion, depends for its solution upon the precise character of the cause of action, and the provisions of the Judicature Act, and the Orders and Rules made under it. It is admitted that before the passing of the Judicature Act such an action could not be maintained at the Common Law side of the Court. Well, then, as to the character of the action. The action is one for conspiracy to injure—to inflict loss and damage upon the plaintiff by boycotting him. The damages accrue from time to time, as the conspirators succeed in their common design to prevent his customers dealing with the plaintiff; and each time damage accrues there is a new cause of action, because damage is the gist of the action. Unlawful agreement alone, irrespective of damage, is the appropriate subject-matter of indictment; but to give a cause of action on the civil side there must be damage as well as conspiracy. This proposition is well established; but as it did not meet with immediate acceptance at the hands of the plaintiff's counsel, it may be well to refer to the opinion of a very high authority, Lord Lindley, in the well-known case of *Quinn* v. *Leathem* (1). In giving judgment in that case, he said:—"The difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked, and is well known. An

(1) [1901] A. C. 495.

illegal agreement, whether carried out or not, is the essential element in a criminal case, the damage done by several persons acting in concert is the important element in an action for damages." When the verdict of the jury was announced in this case, awarding the several sums of £5000 and £500, the Solicitor-General contended that Condon was liable for the aggregate amount of the two sums, that is to say, £5500 in all, though the jury found he was not, as the other defendants were, members of the conspiracy from its inception, and had, according to their finding, joined it at a later date, namely, June, 1900. The Solicitor-General contended before my Lord Chief Baron, and argued before us, that once Condon joined the conspiracy, no matter when it was, he was liable for all the damage which resulted from the conspiracy, whether the damage accrued before or after he joined it—that in fact once he joined the conspiracy—once he threw his lot, so to speak, with the conspiracy, he became onerated with liability for the damage which was the direct consequence of the conspiracy. The Solicitor-General cited to the Lord Chief Baron the case of *Rex* v. *Watson* (1), and relied upon the same case before us. He argued as a primary view that Condon was liable for the full sum of £5500 by reason of his adhesion to the conspiracy, though it took place at a comparatively later date, and he maintained that this being so, the verdict and judgment against Condon for the smaller sum of £500 could not be set aside on the ground that a defendant against whom too little had been awarded could not be heard to complain that his punishment by way of damages was not sufficiently severe—that nowadays since the Judicature Act and its rules substantial wrong and substantial miscarriage are made the tests as to whether verdicts of juries should be set aside, and that therefore the defendant Condon should have been advised to keep out of Court in a spirit of gratitude rather than come into Court and try to set aside the verdict on the ground that he was really worse than the jury thought him—that whatever ground of complaint the other nine defendants, who did not challenge the verdict, might possibly have for not having Condon associated in the aggregate amount of the damages, Condon cannot insist that

(1) 32 St. Tr. p. 7.

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the fact that he had to pay too little amounts to substantial wrong or miscarriage in the eye of the law. This contention on the part of the Solicitor-General is very plausible, and not without its attractiveness, but I think it is not legally maintainable. The flaw in the argument is to be found in the assertion that once a person joins a conspiracy he is responsible not only for future but for past damage, for the damage which has accrued before he joined. In my opinion a person who joins a conspiracy is responsible not for the damage which has accrued before he joins it, but only for the damage which accrues after he joins it, for prospective and not for retrospective damage. I put this hypothetical case to the Solicitor-General: suppose there is a conspiracy to murder, or, to use an expression unfortunately familiar in this country, to remove, Crown officials, and that pursuant to the conspiracy a Crown official is murdered in pursuance of the machinations of the conspirators for the time being, could it be contended that a person who joined the conspirators at a time subsequent to the murder was legally responsible for the crime of murder? It was answered No. The only persons who would be responsible would be the parties to the murder—the conspirators for the time being—that they would be responsible fer the substantive crime of murder, and that the man who joined the conspiracy subsequently would not be in any way responsible; but, after all, if the proposition contended for, that the man who subsequently joins a conspiracy is responsible for the antecedent acts of the conspirators, is correct; why, in the case I put, should not the person who joined subsequently to the time of the commission of the murder be responsible for it?

It is, in my opinion, quite plain that the proposition contended for is not maintainable. The true view, in my judgment, is rightly expressed in the headnote to *The Queen* (*Shaw*) v. *Dwyer and Kelly* (1), which states—"When the existence of a criminal conspiracy is proved, and it is shown that at a certain date the defendant joined the conspiracy, evidence of acts committed by the conspirators in pursuance of the conspiracy prior to that date is admissible as evidence against the defendant, not for the purpose of holding him criminally responsible for these acts,

(1) 24 I. L. T. R. 111.

but for the purpose of showing the character of the conspiracy which he joined." No matter who were sued in conspiracy, whether the ten defendants, including Condon, for their action in reference to O'Keeffe since the 20th June, 1900, or the nine defendants, excluding Condon, for their action in reference to O'Keeffe before that date, evidence of what was done before or after the 20th June, 1900, would have been relevant, and if the action was limited solely to recovery of damages for the loss that accrued after the 20th June, 1900, it would be relevant, indeed essential, to prove what took place before that date in order to show the origin, character, and object of the conspiracy. I asked Mr. Bourke, during the course of the argument, were there two conspiracies or one? Was there a conspiracy up to the 20th June, 1900, and another subsequent to that date, or a continuous conspiracy throughout? He answered, one conspiracy, but two causes of action. I asked the same question of Mr. Barry, and he gave the same answer. That is to say, there was one conspiracy connected with which, and springing out of which, there were two causes of action. There was, in fact, a grievance, by identifying themselves with which the defendants incurred a several liability in respect of the damage which was referable to, and measured by, the period during which they were members of the conspiracy. The conspiracy was, as it were, a machine set going for wrong-doing, and every person who availed himself of its machinery became liable for the damage that subsequently accrued. It is argued on behalf of the defendant Condon that there were two absolutely distinct causes of action against different defendants, and that they could not be combined in one action; and that once the jury found that Condon was not an original member of the conspiracy, but joined it at a later period, and assessed separate damages, irremediable error manifested itself, and that accordingly no relief could be legally adjudged to the plaintiff. I asked did the proposition come to this, that if a conspiracy was entered into in January, and received a new recruit each succeeding month of the year, should there be as many actions as there are months in the year? Should there be twelve actions instead of one? Would one action suffice? Would it be legally possible to bring but one action against all who

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participated in the conspiracy, distributing the damages as against the several defendants according to the several measures of time they were respectively members of the conspiracy? It was insisted that there should be in the instance put twelve separate actions. If this be so—if this be a necessity of our legal procedure—it is, indeed, a grave scandal to the administration of the law. It is, in the language of Lord Lindley, sacrificing substantial justice to wretched technicality.

In my opinion the relevant provisions of the Judicature Act, and of the rules framed under it, show that no such necessity exists. The Judicature Act provides that the Court in every cause and matter shall grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to . . . so that, as far as possible, all matters in controversy between the said parties, respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters be avoided. I note especially the direction in the foregoing provision that all multiplicity of legal proceedings is to be avoided. Again, it is to be borne in mind that each branch of the High Court has identical jurisdiction, subject to the right of any party to apply to the branch of the Court in which an action may have been instituted to transfer it to another branch of the Court supposed to be equipped with a more appropriate machinery for giving adequate relief.

I now come to the two rules which have been more canvassed in this case than any other part of it—Rules 4 and 5 of Order XVI. Rule 4 provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment." This is Rule 4, and it is strongly relied upon on behalf of the plaintiff. So is Rule 5, which provides that "it shall not be necessary that every defendant shall be interested *as to all the relief prayed for*, or as to every *cause of action included in any proceeding* against him." This 5th rule is, in my opinion, all-important in the interpretation of the 4th rule. According to the 5th rule it is quite plain—in fact it says so in so many words—

that in an action within the 4th rule there may be a defendant who is interested to an extent not commensurable with the interest of the other defendants, and who may not be interested in a cause of action that affects them separately. Does this mean that wholly separate and distinct causes of action may be combined in one action against different defendants? I think not, but I am of opinion that it means that causes of action, the proofs of each of which are, so to speak, interlaced, and are connected with, and spring out of, one subject of complaint, such as the one continuous conspiracy in the present case, may be included in one action. The conspiracy attracted Condon at a different period from the other defendants—no doubt he is not interested in the entire relief sought. His interest is not commensurable with that of the other defendants, nor is he interested in the working of the conspiracy, so far as the adhesion of the others to it created a separate cause of action against them separately from him, but he is interested in the conspiracy, which is, so to speak, the main channel from which damage flowed. I think, therefore, that the verdict and judgment are justified by Rules 4 and 5 of Order XVI.

In the course of their able argument Mr. Bourke and Mr. Redmond Barry pressed upon the attention of the Court some cases of undoubtedly high authority: *Smurthwaite* v. *Hannay* (1); *Sadler* v. *Great Western Railway Co.* (2); and *Gower* v. *Couldridge* (3). These cases, however, are quite distinguishable in their facts. In the former there were different plaintiffs and absolutely different interests, and Lord Russell, in giving judgment, said the causes of action were entirely distinct; and in *Sadler* v. *Great Western Railway Co.* (2) the causes of action were absolutely separate and distinct. So also in *Gower* v. *Couldridge* (3), so emphatically pressed by Mr. Barry in reply, there were, to use the language of Lord Lindley in *Frankenburg's Case* (4), distinct liabilities in respect of distinct and separate torts. Here in the case before us there was one continuous conspiracy, in which all joined, and in respect of which, from the time of Condon joining it, there was as against him an inchoate cause of action, which was rendered complete as against him when damage ensued

(1) [1894] A. C. 494.
(2) [1896] A. C. 450.
(3) [1898] 1 Q. B. 348.
(4) [1900] 1 Q. B. 504.

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subsequently to his joining it. These are the distinguishing features of this case, and it is this ground of distinction which justifies the trial, the verdict, and the judgment. The case of *Dawson* v. *M'Clelland* (1), relied upon by defendant's counsel, is plainly distinguishable. There the entire cause of action arose, sprung into existence, *uno ictu*. The act of publishing the libellous matter constituted the cause of action. Here the cause of action was not complete until the damage accrued, and it did not arise simultaneously against all the defendants. It did not arise as against Condon until after he joined the conspiracy, and damage had accrued subsequently to his joining it.

During the argument I wrote out four questions which I handed down to the Solicitor-General, and which I asked him to show to counsel for the defendant Condon. They were as follows:—

> 1. If an action be brought for a single cause of action, and damages alone are claimed, what reported case do you rely upon to show that the damages could be separately assessed?
>
> 2. If the causes of action be separate, what reported case do you rely upon to show that they could be combined in the same action, under Order XVI., Rules 4 and 5?
>
> 3. What reported case do you rely upon to show that the action could be maintained in the Chancery Division?
>
> 4. If brought in the Chancery Division, what reported case do you rely upon to show that relief would be given, as in the present case?

To the first question, the Solicitor-General replied there was no reported case upon which he relied.

To the second question, he replied that he relied upon *Frankenburg's Case* (2) and *Kent Coal Company* v. *Martin* (3); and to the third and fourth questions, he replied that he relied upon *Lyons* v. *Wilkins* (4). As to the two former cases, though useful and instructive, they do not, I think, conclude the matter, because in the first of these cases there was one common grievance—the issue of a fraudulent prospectus, in which all the defendants were jointly concerned from the start, and in the last case the claims for breach of duty against the directors were in the nature of alternative claims or causes of action.

(1) [1899] 2 I. R. 486.
(2) [1900] 1 Q. B. 504.
(3) 16 T. L. R. 486.
(4) [1899] 1 Ch. 255.

In the report of Sir Archibald Smith's judgment in that case he is represented to have said there was "one cause of action." He meant, as I understand him, that there was one state of facts affecting all, out of which flowed alternative claims; but though I think these two cases, *Frankenburg's Case* (1) and *Kent Coal Co.* v. *Martin* (2), are distinguishable having regard to their facts, they are, as I said, useful and instructive. They do not decide the present case for us, but they help us forward on the road to decision. I may refer with advantage to a passage in Lord Lindley's judgment in the former case, which was one action against a company and its directors for rescission of a contract against the company, and for damages against the directors. Dealing with the contention that there should be separate actions against different classes of defendants, Lord Justice Lindley said:—"But to say there should be as many actions as there are classes of defendants would be to render these actions unmaintainable. Just consider what the result would be. The aggrieved shareholder would have to bring perhaps half-a-dozen actions, proving in each action precisely the same facts, with one or two additional facts, to fix each particular defendant. To say those defendants cannot be joined because of some technical difficulty about joining causes of action is to my mind a novelty we ought to discourage. In substance the shareholder has one grievance, call it a cause of action or what you like, and in substance he has one complaint, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of that one thing which they have done, namely, the issuing of a prospectus." "I confess," he added, "I am startled and surprised at finding that there should have been any difficulty about the matter; and I cannot help thinking, if this action had been brought in the Chancery Division, we should never have heard anything of this controversy."

Later in his judgment he is reported to have said in reference to *Gower* v. *Couldridge* (3), "I do not say the prospectus had nothing to do with it, but there were distinct and separate causes of action in the narrow sense alleged there. In the wide sense here, I repeat, the whole cause of action turns upon the issue of the prospectus,

(1) [1900] 1 Q. B. 504. (2) 16 T. L. R. 486. (3) [1898] 1 Q. B. 348.

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and there is nothing more than a complaint against a number of people who have done the plaintiff one wrong by issuing a prospectus which they had no right in point of law to issue." This is the language of Lord Justice Lindley. Now in the present case it may be said that in the wide sense to which the Lord Justice refers the conspiracy was the plaintiff's one substantial ground of complaint, and, apart from mere technical causes of action, was his substantial grievance.

This reference of Lord Lindley's to the Chancery side of the Court leads me to a consideration of the practice there.

There was never any difficulty experienced in a Court of Equity because the liability of one of many defendants accrued at a different time from that of other defendants. Take the case of *Jackson* v. *The Munster Bank* (1), where the liability of one of the defendants arose subsequently to that of the other defendants, and he was adjudged to be liable from that later date. If this present case was brought at the Equity side of the Court, there is, I think, no doubt that an Equity Judge would have full jurisdiction to deal with it. Since the passing of the Judicature Act the jurisdiction of all the branches of the High Court is identical—an Equity Judge, if seised of the case, would have full jurisdiction to grant an injunction against all the parties to a conspiracy, no matter when they joined it, and would have full authority, in order to give complete relief, to award damages against the defendants severally in respect of the actual damage which accrued while the defendants were respectively parties to the conspiracy. The damages to be awarded against each would be limited by the time they were parties to the conspiracy; and if this could be done at the Equity side, as I think it undoubtedly could, it necessarily follows that it could be done at the Common Law side of the Court. The jurisdiction is identical in both branches, and the only rules applicable to such a case would be Rules 4 and 5 of Order XVI.; and if these rules would authorise such a course at the Equity side, the identical rules expressed in identical language must have the same effect at the Common Law side. It was argued that at the Equity side of the Court general damages could not be awarded by

(1) 15 L. R Ir. 356.

an Equity Judge—that it was the province of a jury alone to determine upon the existence of malice and to award damages. This proposition ignores the fact that the jurisdiction of all the branches of the Court is identical—that it was intended by the Judicature Act to give complete relief in each action in whatever branch an action may be instituted, though the machinery of one branch may not be as appropriate or effective as that of another branch. Not that I think vindictive damages were awarded in this case. No doubt, in determining the character of the conspiracy the jury investigated, under the direction of the Judge, the malicious extent and objects of the defendants; but it is, in my opinion, equally certain that they did not, in estimating the damages, make the malice of the defendants a ground for awarding exemplary or vindictive damages. The damages they awarded were given in respect of the actual injuries the plaintiff sustained, and large as the amount of the damages appears, they were, in my opinion, wholly inadequate to compensate the plaintiff for the losses he sustained. It must be remembered, too, that since the Judicature Act an action for libel can be brought at the Equity side: see the case of *Hayward* v. *Hayward* (1), where the question of actual malice was investigated and determined, and where the occasion upon which the libel was published was held not to be privileged by reason of the existence of actual malice, and general damages were awarded. I may also refer to the case of *Lyons* v. *Wilkins* (2), cited by the Solicitor-General, where malice resulting in injury and conspiracy to inflict injury were complained of. There an injunction was claimed, and Lord Justice Lindley in his judgment said—"That leads me to the second point, which is, that we ought to leave these people to the summary jurisdiction of a magistrate. I do not think so. This is obviously a case in which a man's property, his trade, his livelihood, and the goodwill of his business will be absolutely ruined if what is complained of is not peremptorily stopped; and, according to the well-known principles by which the Court of Chancery has been guided, it is a case in which a man's property and trade has been so interfered with that he may come to the Court for the protection which an injunction affords him."

(1) 34 Ch. D. 198. (2) [1896] 1 Ch. 811; [1899] 1 Ch. 255.

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Once a plaintiff has a *locus standi* in Court, the jurisdiction of all branches of the Court being, as I have more than once said, identical, the particular branch in which an action is instituted must give complete relief, to be worked out according to its machinery. Every appropriate remedy is to be applied, and multiplicity of actions avoided. It is clear, in my opinion, that the verdict and judgment were right. The questions involved in this case are important from the point of view of procedure, and are certainly interesting to lawyers. But to lawyer and layman alike the facts disclose a repellant picture. In all the history of the litigation in our Irish Courts it would be difficult to find a case which was characterised by more malignant or persistent wrong-doing than that in which it has been our duty, as to one of its branches, to proceed to judgment to-day. The Tallow Conspiracy will be always remembered for the unexampled persecution of an honest, upright merchant, who did no wrong, and for the punishment which at long last has overtaken the conspirators. By the time the damages, £5500, awarded in this case have been levied, the authors of the cruel wrongs inflicted on the plaintiff may be houseless and homeless, and if their children cry in vain to them for bread, there will, indeed, be bitter searchings of the heart. Crime has its pathetic side. The innocent are often involved in the ruin that overtakes the guilty. This case is, indeed, a signal and striking example of the punishment that awaits crime, for boycotting devised in recent times is a very deliberate and very cruel crime.

One feature alone stands out in prominent and very pleasing relief—I refer to the action of the Rev. Mr. Morrissey. He used all his influence and exerted all his energies to put an end to that system of boycotting, which the law of the land, and the rescript of the head of the Church to which he belonged, alike condemned.

The verdict and judgment must be affirmed, and the defendant Condon's motion refused with costs.

GIBSON, J.:—

Three objections are advanced against the verdict and judgment: (1) there was no evidence connecting Condon with the conspiracy at all; (2) even if there was such evidence, there is nothing to show that he was a member during the period in respect of which the £500 was assessed; (3) there was a fatal misjoinder, and damages could not be separately assessed in a joint action.

On the first and second points I entertain no doubt. The Tallow branch was established to deal with O'Keeffe. The Conna district was intended to be and was thereby affected, the corn business coming thence at once dying away. The Conna secretary assisted at the Tallow meetings from an early period, and took part in the so-called "conferences" for picketing. The Dooley incident suggests the inference that Dooley was punished by the Conna branch for dealing with O'Keeffe. It was the duty of the Conna branch, according to the constitutional law of the League, to carry out the policy of the Tallow branch. A difference arose between the branches at the time of the Keniry settlement in June, 1900, and Father Morrissey in December got a resolution passed dissociating Conna from the action of Tallow. Condon proposed and carried a motion that this resolution should be rescinded. Condon, who himself had discontinued dealing with plaintiff in June, 1899, was president of the Conna branch till September, 1900, when he resigned. He took office again in December, though not as president, and he was in office when he proposed his rescinding resolution. He was frequently in communication with the leader of the conspiracy in Tallow, and I would gather took part in some of the "conferences" there, which were regularly attended by the Conna secretary. Dealing with the testimony of hostile and unreliable witnesses, the jury were entitled to accept admissions wrung from them, and reject attempted explanations as flimsy excuses: they had evidence from which, as a whole, they might infer Condon's association with the conspiracy.

The time when Condon became a member could only be collected by inference. He was not himself examined; the books were burned, and his action about the resolution in December is evidence not that he then joined for the first time, but that he was then actively participating in the conspiracy. Taking the entire

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evidence, the jury were at liberty to find that during the period covered by the £500 all the defendants were jointly and equally responsible, and possibly they might even have carried back the liability further. Even in a case under the Statute of Limitations possession was inferred to have commenced at an earlier period than the actual possession proved. Thus in *Sanders* v. *Sanders* (1) Sir G. Jessel says:—"Payment of a moiety of the rents for thirteen years is good evidence that a moiety was paid previously." See *Winterbottom* v. *Lord Derby* (2).

I now turn to the third objection. Before dealing with it, I must briefly refer to the contention put forward by plaintiff's counsel at the trial, and not quite abandoned here, that the moment Condon joined he became liable for all antecedent damage resulting from this conspiracy. They relied on a passage occurring in Bayley, J.'s charge to the Grand Jury on the trial of Watson for high treason: 32 St. Tr., at page 7. The learned Judge was plainly referring to evidence of the object and character of a conspiracy at the time the new member joins it, and not to responsibility for previous overt acts by others. The burning of a hayrick in pursuance of a conspiracy to injure and intimidate an obnoxious individual could not be made, as against a subsequent member, the subject of either civil or criminal liability. Conspiracy is, like partnership, a branch of the law of principal and agent. There are two conclusive answers to responsibility by relation. Where there is no existing principal there can be no agent: *Kelner* v. *Baxter* (3); and there can be no ratification or adoption of acts which, when done, were not done by the supposed agent in the character of agent: *Wilson* v. *Tumman* (4); *Keighley* v. *Durant* (5). The proposition contended for seems to me an impossible one; it is opposed to all legal principle, and the only resemblance of authority cited to support it was the quotation from Bayley, J.'s charge, which clearly relates only to proof of the character of a conspiracy, and not to the extraordinary doctrine of retrospective liability.

This brings me to the real question so elaborately argued. In

(1) 19 Ch. D. at p. 380.
(2) L. R. 2 Ex. 316.
(3) L. R. 2 C. P. 174.
(4) 6 M. & G. at p. 242.
(5) [1901] A. C. 240.

an action like this, where the liability accrues at different dates, and all the defendants are jointly liable at the time the action is begun, can the damages be assessed in part distributively according to the time they became members of the unlawful partnership?

The case before us is of one single conspiracy carried on for a long period of time by picketing and otherwise, destroying the plaintiff's business and comfort—a combination which, according to the reasoning in *Lyons* v. *Wilkins* (1), was a nuisance, and as such could have been restrained by injunction, probably before, and certainly since, the Judicature Act. Each day the nuisance continued there was a new growing cause of action from the injury, just as there would be in the case of a nuisance caused by the pollution of a stream.

Before the Judicature Act there were two dissimilar systems of procedure in force. At law, in a joint action the verdict against joint defendants was joint, and the judgment entire. For a long time it was supposed that where torts were committed at different times, damages could be distributed: *Heydon's Case* (2); Croke, Eliz. 860; Croke, Car. 54; Huband, p. 832; and that this was the law is stated without hesitation in the 8th edition of Tidd, p. 927, published in the year 1824. The contrary view, however, afterwards prevailed, and the question was set at rest by section 54 of the Common Law Procedure Act, 1853.

In equity, on the other hand, the suit, unlike a common law action, was confined to a single principal subject of complaint; but subordinate causes of action connected therewith against persons connected only in part with the case could be joined: *Inman* v. *Wearing* (3); *Consett* v. *Bell* (4); and the appropriate remedy distributed. A familiar example is the joinder of an auctioneer to recover a deposit: *Egmont* v. *Smith* (5); and a solicitor for payment of costs. The great principle of equity was to avoid multiplicity of actions. Accordingly, a suit for waste against an executor and heir in respect of waste committed by the testator and continued by the heir was entertained: *Bishop of Winchester* v. *Knight* (6); though the account against each defendant was

(1) [1899] 1 Ch. 255.
(2) 11 Rep. 8.
(3) 3 De G. & Sm. 729.
(4) 1 Y. & Coll. Ch. 569.
(5) 6 Ch. D. 469.
(6) 1 P. Wms. 406.

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manifestly distinct; and where the equitable jurisdiction to stay waste attached, compensation was given without putting the plaintiff to an action at law: *Jesus College* v. *Bloom* (1). In certain cases under statutory powers, damages were given in lieu of an injunction, e.g. *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (2), where it appears that £200 damages were awarded. The leading note of an equity decree was its flexibility according to the rights and liabilities of the parties, whereas a common law judgment was rigid and entire.

The object of the Judicature Act was to stop needless multiplication of actions, to prevent failure of justice from a mistake of forum, to extend equitable relief, and to introduce a homogeneous procedure applicable to all Courts without distinction. Save in certain specific instances, expressly provided for, substantive law was not altered by the new procedure: it did not, by a confusion of law and equity, generate rights where none existed before; but in certain cases new jurisdiction to give relief was created, as, for example, in the case of libel. Before the Act, an injunction to restrain a libel was impossible: *Prudential Assurance Company* v. *Knott* (3); whereas now this remedy is applied, and damages can be awarded: *Hayward* v. *Hayward* (4). In case of an action of libel brought against a partnership for an injunction and damages, could the Court not now discriminate (if the libel was continuous and identical) as to the liability of the partners if they became members at different times?

The new rules show a clear intention to apply and extend equitable relief and procedure, as to parties, and otherwise, to all actions, but the procedure is more elastic than before. The restrictions on alternative relief, &c., are now removed. No matter what view is taken of our present rules, it is certain that they are inconsistent with and displace the former procedure at law, under which alternative relief against same joint defendants was impossible, and the judgment was necessarily entire in a joint action. If the Chancery Division can now in a proper case distribute liability, this Division must have the same power under the

(1) 3 Atk. at p. 263.
(2) 6 Ch. D. at p. 769.
(3) L. R. 10 Ch. 142.
(4) 34 Ch. D. 198.

same rules if the nature of the case presented in the pleading permits of such distribution.

Order XVI. unquestionably governs pleading in the King's Bench as well as Chancery actions. Rules 4 and 5 are expressed in such a way as apparently to apply to the present case. Rule 4 enables the respective liabilities of defendants to be regarded in the judgment, and Rule 5 expressly states that it is not necessary that every defendant should be interested "as to every cause of action included in any proceeding against him." "Cause of action" has more senses than one, as is pointed out in Wilson's edition of the Judicature Acts: it may mean, in a wide sense, the subject-matter of complaint, the grievance founding the action; or it may signify technical cause of action.

Counsel for Condon admit that in an action against trustees for breach of trust in making and retaining an unauthorised investment, the liability of the co-defendants can be distinguished retrospectively according to the time when they respectively became responsible: *Jackson* v. *Munster Bank* (1); *Mitchelstown Loan Fund Case* (2).

I understood Mr. Barry also to admit that in an action for fraudulent combination, such as that charged in *Studdert's Case* (3), the liability of the joint defendants could be discriminated according to the time and share of their participation in the fraud. In such a case there was before the Act concurrent jurisdiction at law and in equity. In both the above examples the cause of action for breach of trust or fraud against different defendants might accrue at different times.

Take the following further illustrations:—A plaintiff sues a partnership, trading under a firm name (the names of the actual members of the firm being unknown to him), for continuing pollution of a stream, or continuing trespass from defendants' mill encroaching on his land, or for invasion of his coal mine and long continued abstraction of his coal, and he asks for an injunction, and an account of damages or profits, as the case may be. There are three partners in the defendant firm at the time the action is brought, and all have been guilty jointly in respect of

(1) 15 L. R. Ir. 356. (2) [1903] 1 I. R. 282. (3) [1902] 1 I. R. 240.

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the continued tort. A has been in the firm from the commencement of the wrongful acts; B was partner from the same time, but was out of the firm for an interval, when he rejoined it; and C joined the firm some time after the wrongful acts were begun. Notwithstanding that the commencement and duration of the causes of action are different as to each partner, cannot their respective liabilities for damages, &c., be calculated with reference to the time they were respectively partners? All the partners being before the Court, there being a single grievance and a joint liability established for portion of the damages accrued next before action, why should the plaintiff, instead of having all the damages assessed, once for all, jointly and distributively, be compelled to bring separate actions?

In such a suit as *Mayor of York* v. *Pilkington* (1), where the plaintiff sought to be quieted in the possession of his fishery, and asked for an account of the fish taken against the several defendants claiming under different titles, the liability of each defendant was necessarily separate. The same remark applies to such a case as *Daly* v. *Murray* (2), a suit to establish title against trespassers. These cases are, of course, distinguishable; but if this type of action is now competent (as I think it is), they show that what are separate and technical causes of action with separate damages may be combined in one action where the plaintiff's substantial subject of complaint is single against all.

Can the effect and meaning of Rules 4 and 5 shift according as the subject of action was within the exclusive or concurrent jurisdiction of equity, or was only enforceable at law? The principle of discriminating liability, which is not a rule of pleading but of equity, ought not to vary with the tribunal, or depend on the accident of an injunction being asked for, or, if asked for, granted or refused on the merits, or because damages are awarded in lieu thereof. Whether the account or inquiry is as to profits and damages, whether the account or inquiry is in the Law or Chancery Division—the same principle should apply: the date of the accrued liability should govern the assessment of damages in a joint action for a continuing wrong. One of the great scandals of the former

(1) 1 Atk. 282. (2) 17 L. R. Ir. 185.

procedure was the apparently unintelligible difference between the forms of relief given at law and in equity, and the fatal consequences attending a mistake of forum. The object of our new system is, so far as possible, to subject all actions to the same rules. In the present case the damages were not capable of being computed by accurate calculation, but represent an estimate of loss. They are not apparently punitive, if such damages could be properly given. Even if they could be deemed punitive, that would not affect the construction of Rules 4 and 5, which are of universal application.

The difficulties in the way of defendant's construction of the rules are formidable. That interpretation involves needless multiplicity of actions, which it was the declared object of the Judicature Act to prevent. It must work injustice: recovery of judgment against some of several joint tort-feasors absolves the others: *Brinsmead* v. *Harrison* (1); so that if the defendant now escapes, he is free free from liability for ever in respect of the joint cause of action. Further, the narrow construction of Condon's counsel is inconsistent with the established Chancery practice, which in a joint action where joint liability is established enables the liability of the parties to be differentiated in point of time. Again, in some cases it is certain that the damages or account must be assessed or taken distributively. This is illustrated by some of the cases already cited. In an action against partners for encroachment on a mine brought in the King's Bench Division, in which action, under Ord. XXXVI., R. 52, damages might be assessed until the date of the inquiry, the cause of action continuing, if one of the partners died, his estate would only be accountable for the actual profits received up to his death, while the liability of the surviving partners would be quite different, and might continue till a later date. Finally, it is obvious that, unless such a judgment as that given in this action is competent, an action for injury in respect of a conspiracy of long duration might be paralysed and impotent; the adhesion of the defendants respectively could only be established by inference, and might take place at different times, which cannot be known to the plaintiff before the trial.

(1) L. R. 7 C. P. 547.

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Whatever "cause of action" may signify, its meaning must be the same in every Court. *Temperton* v. *Russell* (1) was relied on as an authority the other way. That case only decides that the rules as to class representation applicable to Chancery procedure do not extend to an ordinary common law action. Rules 4 and 5, however, certainly embrace common law actions, and *Temperton* v. *Russell* (1) is not therefore in point. "Cause of action" means, I think, the substantial subject-matter or grievance on which the action is founded: it is not merely the technical cause of action. None of the authorities cited by Mr. Bourke are opposed to this. In all of them the causes of action, in the wide sense, on the part of the plaintiffs (as in *Smurthwaite* v. *Hannay* (2)), or against the defendants (as in *Sadler's Case* (3), *Gower's Case* (4)), were separate and distinct. *Frankenburg's Case* (5) goes upon this distinction. There the technical causes of action were dissimilar, though the foundation of complaint was the same. In the present case defendant's counsel insist that damage is essential to the right of action, and that there was a fresh cause of action every day that damage was caused by the unlawful combination. The same remark, however, applies to every action for continuing nuisance, trespass, or excavation occasioning continuous subsidence. Even a crime may be treated as continuous, though, having been committed on discontinuous days, separate prosecutions might have been brought: *Ex parte Bunbury* (6). In *Walters* v. *Green* (7) the acts complained of were apparently done by the respective defendants on different occasions. It might have been necessary to assess the damages distributively if damages had been claimed.

I do not rely on the cases as to alternative relief, such as *Chapleo's Case* (8), and *Bennett* v. *M'Ilwraith* (9), as such cases are expressly provided for by Order XVI., Rules 4 and 7. *Kent Coal Co.* v. *Martin* (10) may possibly be thus explained, though the *ratio decidendi* of the judgment as reported appears to proceed on the supposed application of *Frankenburg's Case* (5).

(1) [1893] 1 Q. B. 438.
(2) [1894] A. C. 494.
(3) [1896] A. C. 450.
(4) [1898] 1 Q. B. 348.
(5) [1900] 1 Q. B. 504.
(6) [1901] 2 K. B. 458.
(7) [1899] 2 Ch. 696.
(8) 6 Q. B. D. 696.
(9) [1896] 1 Q. B. 464.
(10) 16 T. L. R. 486.

I agree with the Chief Baron in thinking that *Dawson* v. *M'Clelland* (1) is distinguishable; that was an action for one tort, and the defendants being jointly charged and jointly found guilty, the damages could not be (the Court held) apportioned. There was there no case of continuing liability. Two of the Judges in that case decided the case on the course of the pleading and trial, and not on the construction of the rules. The practice of severing damages in a libel action is, I believe, not uncommon in England, where the law laid down in *Dawson* v. *M'Clelland* (1) has been seemingly overlooked. That authority does not apply where the action is rightly brought against all, but the liability, joint as to all at the time of action, originates at different dates.

Condon's counsel urge that their client was taken by surprise and prejudiced, a single cause of action against all being suddenly converted into two—one against all, the other against some of the defendants. I do not concur in this. If relief had been claimed alternatively (which clearly might have been done under the rules), the suggestion of surprise could equally have been made, and would have been equally unsustainable. The plaintiff could not know beforehand when the respective defendants became members of the original partnership, and he could not be asked to distinguish between them in point of time on his pleading. The defendants were all found jointly liable, but as to part of the damages before he joined Condon was absolved, the jury giving effect to Mr. Bourke's contention. Counsel suggested that when it appeared that Condon joined after the others, he was thereby at once entitled to a verdict and judgment in his favour. This is not so. Even if the plaintiff was compellable to elect, he could not have been so compelled till verdict (up to which time the materials for election did not exist): *Child* v. *Stenning* (2); and if asked to elect, he might have preferred a judgment for £500 against all the defendants (including Condon) to a verdict for £5500 without Condon—which latter verdict, though of more scenic effect, might have been of less cash value. If I be right in my view of the rules, there was no necessity for election; the damages in respect

(1) [1899] 2 I. R. 486. (2) 7 Ch. D. 413.

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of a continuing and growing cause of action could not legally have been assessed in any other way, and no amendment was necessary under the express language of Rule 4. There was no surprise; the plaintiff attempted to make Condon liable from the beginning; Condon alleged he was not liable at all; each partially succeeded.

The leave to amend reserved by the learned Judge removes all difficulty. The case could have been properly framed as an injunction suit, like *Lyons* v. *Wilkins* (1). In such a suit the defendants' liability would have been assessed distributively in point of time. Treating, however, the action as one for damages only, I think that the judgment can still be moulded in the same way as an equity decree, the same rules now governing all procedure.

The construction of the new rules contended for by Condon's counsel seems opposed to their obvious policy and meaning: if correct, it would revolutionize existing Chancery practice, and it would enable senseless technicality to triumph over justice and common sense. Principle favours, and no authority is against, the judgment of the Lord Chief Baron, which, in my opinion, is entirely right, and must be affirmed.

KENNY, J.:—

The jury have found that all the defendants, including Condon, maliciously conspired to induce, and in fact did induce, persons not to deal with the plaintiff, and that loss resulted to the plaintiff thereby. They further found that the defendant Condon did not join that conspiracy until some time after the 20th June, 1900—and, in effect, they awarded £5500 damages as against all the defendants save Condon—but as against him they assessed the damages at only £500, as representing his liability after his connexion with the conspiracy commenced. The only defendant who has challenged this verdict is Condon, and it has been submitted on his behalf, in an argument of a very full and elaborate character, that there was no evidence on which the jury could reasonably have come to the conclusions at which they arrived.

(1) [1899] 1 Ch. 255.

As to the merits of this contention, I have never entertained a doubt from the moment that I concluded the perusal of the evidence given at the trial before the Lord Chief Baron. So clear, to my mind, is that evidence, that if the jury had not distinguished between Condon and the other defendants, and had found that he was personally incriminated from the very inception of this conspiracy, in the year 1899, I do not think such a finding would be disturbed by this Court. I do not mean to subject the evidence to a detailed examination, as my Lord has already done so very effectively, and I shall merely state in a few words the grounds for my judgment that this verdict is absolutely right in holding the defendant Condon to be a member of this malicious conspiracy, and a party to the overt acts that have occasioned damage to the plaintiff O'Keeffe.

Up to the end of 1898, or beginning of 1899, the plaintiff was the leading trader in the town of Tallow, in the county of Waterford, and his business as a buyer and exporter of grain and timber and an importer of coal embraced the country within a radius of several miles from his establishment. Down to this period, according to the evidence, there was no branch of the United Irish League in the county of Waterford, and Tallow and its neighbourhood enjoyed a complete immunity from exceptional crime. But in 1899 the plaintiff O'Keeffe offended against some of the mandates of that body, and it was considered expedient by those who, I presume, had control of its movements, to establish branches of the organization in Tallow, and in an adjoining district from which O'Keeffe drew his corn supply—sometimes called Ballynoe and sometimes Conna. Before formally doing so a deputation was appointed to wait on members of Parliament, and in August, 1899, according to the evidence of Kearney, who was then the temporary treasurer of the League, that deputation had an interview on the subject with at least one member of Parliament, namely, Mr. W. O'Brien. At that interview the secretary of the Ballynoe branch was present. There can be no doubt, on the evidence in the case, which was never sought to be contradicted, that the immediate and direct object of the United Irish League in this case was to effect the commercial ruin of a single individual, on the ground that he had broken some of the

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laws of this association—in my opinion, criminal in its objects and methods—which has been permitted to exist and flourish in the midst of an otherwise law-abiding community. From that time in 1899, down to June, 1900, a system of organized and, in the words of the defendant Condon's counsel, "ferocious" boycotting was directed against this unfortunate merchant at the instance of the United Irish League, the local leaders of the movement being, as found by the jury, the nine defendants in this case other than Condon. Evidence of persons having been induced not to deal with O'Keeffe was overwhelming. The consequence naturally followed that the plaintiff's business was ruined. In the words of the threat, proved to have been held out to him, he "was brought to his knees." In June, 1900, he compromised with his persecutors by a payment of £300, and thought that he had thereby purchased peace. That, however, was not to be, for he was again denounced by the League in August of 1900, and his business, which had revived somewhat in the six weeks or two months that had intervened, again began to droop. From that date it has never revived, and the present position of things with this, the leading merchant of the town, is, that according to his own matter-of-fact statement he is continuing his trade on the basis of paying 9*d.* more for oats than his opponents, and selling at 4*s.* to 5*s.* under his competitors.

This statement of the situation is practically accepted without denial. It is significant to a degree that not one of these incriminated defendants has tendered himself for examination. Witnesses for the plaintiff, who were members of the United Irish League, refused to answer certain questions on the ground that the answers might incriminate them, and the minute-books of the branch of which the defendant Condon was chairman, and also those of the West Waterford executive of this body, have been deliberately destroyed.

The defendant Condon contends there is no evidence reasonably fit to be submitted to a jury to connect him with this conspiracy. The case against him is this. He was a customer of O'Keeffe's up to June, 1899. From that date he, in common with other members of the United Irish League, ceased to deal with him. In doing so he was quite within his right. But in the same year

he became chairman of the Ballynoe branch of the association, and that branch, according to the evidence of its secretary M'Auliffe, worked in complete harmony with the Tallow branch down to June, 1900, when O'Keeffe paid his £300. In other words, the common object of the two branches down to that date was the boycotting of O'Keeffe. Condon continued as chairman down to September, 1900; and although he then resigned his chairmanship, it is clear that he continued to be an active member of the association, so far as the persecution of the plaintiff was concerned. His conduct in this respect stands out in strong contrast to that of Father Morrissey and others who objected to the renewed boycotting of O'Keeffe after the latter thought he had effected a settlement in June, 1900. He is shown to have been in personal communication with the leading spirit of the conspiracy, Patrick F. Walsh, and to have been present at meetings of the executive of the association. Finally, after his resignation of the chairmanship, he, in the month of December, 1900, took the very deliberate step, in the face of the wise and Christian counsel of his clergyman, Father Morrissey, of moving and carrying a resolution which had for its object a continuation of combined action with the Tallow branch. There was some evidence given with the object of suggesting that the meeting of the executive in Fermoy was not directed to any friction between the two branches on the subject of O'Keeffe; but Condon's counsel has admitted in the most complete way that the executive meeting referred to in M'Auliffe's evidence was the Fermoy one; and M'Auliffe, who was secretary to the Ballynoe branch, and chairman from September, 1900, puts it beyond doubt that the Fermoy meeting was held for the purpose of bringing Ballynoe into line with Tallow and preventing an apprehended withdrawal on account of the settlement.

During the very prolonged argument on this part of the case we have tried again and again, but without effect, to elicit from defendant's counsel the tangible ground of the contention that this mass of evidence was not such as a jury might reasonably act on in their consideration of the question whether Condon was a co-conspirator with the other defendants in their criminal work. It seems to me that not only were the jury amply justified in coming to the conclusion that he was *particeps criminis*, but

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the circumstances proved might well have warranted a finding that his connection with the persecution of O'Keeffe was in no way distinguishable from that of the other defendants.

I leave that part of the case, and proceed to say a few words on the main question which involves the propriety of the verdict, in respect of damages, and of the judgment consequent thereon of the Lord Chief Baron. It is contended for the defendant Condon that it was not open to the jury in an action constituted like the present to differentiate between the defendants in respect of the quantum of damage attributable to the acts of each, and that a judgment based on, and giving effect to, such a verdict is absolutely wrong. Had the jury found—as I have already said they might, in my opinion, reasonably have found—that Condon was involved in this conspiracy from its commencement, and was answerable for the same damages as his co-conspirators, this point, to which so exhaustive a legal dissertation has been devoted, could not possibly have arisen. So that what enables it to be now raised and discussed is the expression of the view taken by the jury that Condon's real and active participation in these transactions was not referable to a period anterior to June, 1900. Had they found that he was a party to the conspiracy and overt acts for the entire period from 1899 down to the commencement of this action, he would have been fixed with a sum of £5500 damages, whereas, in the lenient view which the jury took, his liability stands at only £500. This is the more interesting when it is remembered that this verdict and judgment are impeached on the most technical grounds, that no point of substance is involved, and that no inconvenience, much less hardship, is inflicted on the defendant. I confess that in the absence of either the one or the other I do not feel coerced to extend any special favour to arguments which seem to me to be opposed in spirit at least to those attempts at reformation in our procedure which it was the aim of the Judicature Act to effect. The point submitted to us is, that once the jury differentiated as they did in favour of Condon, he was entitled to have the action dismissed as against him. It is said that the present cause of action is either a joint one against all the defendants, or, as against Condon, is a separate and distinct one from that against his co-defendants. If it be a joint action, framed

and fought as such to the very end, *Dawson* v. *M'Clelland* (1) is relied on as establishing that damages cannot be apportioned. If, on the other hand, there is one cause of action against all the defendants except Condon, and a separate one against him, which, it is contended, is the true meaning of the verdict, then *Sadler* v. *The Great Western Railway Co.* (2) and *Gower* v. *Couldridge* (3) are governing authorities against the joinder of such causes of action. If the facts of this case can be brought within one of these authorities, we would be bound to give effect to it. *Dawson* v. *M'Clelland* (1) is a decision of the Irish Court of Appeal; *Gower* v. *Couldridge* (3), of the English; but in view of the case of *Frankenburg* v. *Great Horseless Carriage Co.* (4), which I regard as a case in its facts and the legal results flowing from them—intermediate between those, and to the subsequent case of *The Kent Coal Co.* v. *Martin* (5), it becomes necessary to inquire if the circumstances of either *Dawson* v. *M'Clelland* (1) or *Gower* v. *Couldridge* (3) are so identical with or similar to those in the present case as to preclude us from questioning them as ruling cases in the contention before us. In these cases the construction of Order XVI., Rules 4 and 5, and incidentally Order XVIII., were under review. Under these Orders several defendants may be joined where the relief sought is alleged to exist jointly, severally, or in the alternative, and judgment may be given against such one or more according to their respective liabilities. Furthermore, while the plaintiff is allowed to unite in the same action several causes of action, no defendant need be interested as to all the relief prayed for, or as to every cause of action included in the proceeding against him. With the power which the Court has vested in it of striking out defendants and causes of action, the joinder of which might embarrass a defendant by causing him inconvenience or expense, one would *prima facie* think that, subject to the exercise of that power, it would be difficult to find a case involving community between the parties to which these very wide and elastic rules would not extend. But unquestionably they have been confined in their application, and in approaching the

(1) [1899] 2 I. R. 486.
(2) [1896] A. C. 450.
(3) [1898] 1 Q. B. 348.
(4) [1900] 1 Q. B. 504.
(5) 16 T. L. R. 486.

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consideration of the present case we are, as the result of the authorities to which I have referred, bound, in my opinion, to proceed on the basis of two assumptions. The first is, that where there is a single cause of action, arising from a joint tort, and damages is the only relief claimed against the joint *tort-feasors*, and the action is fought out to the close on that basis, the jury have no power to sever the damages. That is the decision in *Dawson* v. *M'Clelland* (1). The other assumption is, that claims for damages against some defendants in respect of a tort committed by them cannot be combined with a claim for damages in respect of a separate tort alleged either against the others or against all. *Sadler* v. *The Great Western Railway Co.* (2) and *Gower* v. *Couldridye* (3) are authorities for this proposition.

I shall consider the application of *Dawson* v. *M'Clelland* (1). The cause of action in that case was libel, and the defendants were the owner and publisher of the newspaper and the writer of the libel. The jury apportioned the damages, and this Court and the Court of Appeal held that the action was brought and the trial proceeded as for a joint tort, and nothing more—that each defendant was liable for the whole damage, if liable at all—and that such damage was a sum representing the injury suffered by the plaintiff from a single wrong inflicted by all (see judgment of Holmes, L.J., at p. 501). The decision turned on the nature of the cause of action and its singleness of character. It was pointed out that the plaintiff might possibly have split up his joint cause of action and elected to proceed against one defendant alone—or have combined in the one action three distinct claims against the defendants separately. What the Court would have done in the latter case was not indicated, but it is very significant that both Walker and Holmes, L.JJ., rely mainly on the course of the trial, and the latter throws out a suggestion for the amendment of the plaintiff's claim. In my opinion there are features in that case which prevent its being relied on as a parallel case to the one we are considering. In the first place, the action was brought in respect of a single tort—indivisible in point of time and continuity, and not dependent on damages for its actionable character.

(1) [1899] 2 I. R. 486. (2) [1896] A. C. 450. (3) [1898] 1 Q. B. 348.

The degree of liability of the defendants, though distinguishable according to the positions they occupied in connection with the publication of the libel, involved no question of liabilities, which, while flowing from the one identical and original source, still came into existence at different times. In the case before us we have, in my opinion, a wholly different set of circumstances. The wrong that is alleged is of a compound character, its elements being malicious agreement to do a wrongful act, and the act itself done in pursuance of the agreement, and causing damage to the plaintiff. These two elements may not happen concurrently ; on the contrary, as the present case shows, there may be an interval between the original agreement and the committing of the wrongful acts. The grievance or complaint does not result in a "cause of action" until the act has been done that causes the damage ; but the action is called an action of "conspiracy," and the very essence of it is the wrongful agreement. The original conspiracy may receive an accession of strength in numbers by the addition of new members from time to time, who thenceforth become bound by the acts of their co-conspirators. The cause of action is really one that accrues from day to day, somewhat like a continuing trespass or a continuing nuisance—the wrongful agreement being its *fons et origo*. Thus, where there are several persons joining the conspiracy at different times, increasing its volume and momentum, there is not only a joint cause of action as against all with possibly a varying liability to damage, but also separate rights of action against each, with necessarily a separate assessment of damages. But whatever the liability to damage may be, the common ground of complaint is the wrongful conspiracy. Is it to be said that in a case of that description, Rules 4 and 5 of Order XVI. (in the commentary on which by the Lord Chief Justice and my brother Gibson I altogether concur) and Order XVIII. are not wide enough to sanction a separate assessment of damages, and that a jury could not regard a particular defendant as not being interested in the whole relief prayed for, or in every technical cause of action disclosed by the pleadings? I confess I cannot help agreeing with the Lord Chief Baron that it would be a scandal if such an argument was to defeat this action against the defendant Condon.

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But, again, this action differs from *Dawson* v. *M'Clelland* (1) in this, that it is manifest from the requisition made at the close of the plaintiff's case that the question of the smaller liability of the defendant Condon was present to the mind of his counsel, and that the point of the "course of the trial" cannot be pressed to the same extent that it was in *Dawson* v. *M'Clelland* (1). Furthermore, the Chief Baron reports that though having considered no amendment necessary, he was quite prepared to allow one to the extent, at least, of a claim for an injunction. Such an amendment would be important from the point of view that if the claim were one for injunction as the main relief, with a subsidiary claim for damages, I cannot see how Condon could escape when it could not be alleged that the case against him was a separate and independent tort resulting in separate liability. In this respect the case is not unlike *Walters* v. *Green* (2).

If this case does not fall within *Dawson* v. *M'Clelland* (1), is it then governed by *Sadler* v. *The Great Western Railway Co.* (3) and *Gower* v. *Couldridge* (4)? In these cases there were separate causes of action based on separate torts, with distinct and separate liabilities arising from them, without any connecting link, or any common source of grievance, and it was held that these separate causes of action could not be combined in the one action against the several defendants who were sought to be made answerable for their respective liabilities. But there are cases where that connecting link and common source of grievance have been held to be a distinguishing element, and to justify the joinder of the several defendants in what was regarded as in substance a single cause of action. *Frankenburg* v. *The Great Horseless Carriage Company* (5) is, to my mind, a striking illustration. The action was by a shareholder against three parties named—(1) the directors, who had also been promoters; (2) the Company; and (3) the executors of a deceased director; and it claimed, as against the Company, cancellation of the allotment of the plaintiff's shares, and a return of his money, and rectification of the register; and, as against the directors, damages for fraud

(1) [1899] 2 I. R. 486.
(2) [1899] 2 Ch. 696.
(3) [1896] A. C. 450.
(4) [1898] 1 Q. B. 348.
(5) [1900] 1 Q. B. 504.

in the prospectus. It is manifest that here there was every reason for alleging that the causes of action were separate. The directors had nothing to say to the relief by cancellation and rectification. The Company was uninterested in the claim for damages. The latter claim did not arise from the mere issuing of a fraudulent prospectus, inasmuch as damage was an essential factor in the cause of action, and none was suffered until the plaintiff paid his allotment-money. So, also, the plaintiff could not obtain a cancellation of his allotment and rectification of the register without showing that he was damnified. Again, it was contended for the executors of the deceased director that the cause of action against them was different from the causes of action against the other defendants, and that they were liable only to the extent to which their testator's estate had benefited by the fraud. If that contention were right, the benefit to the estate might be represented by a much smaller sum than the amount of the allotment-money, or the damages for fraud. Yet the Court of Appeal, consisting of Lindley and Romer, L.JJ., took a distinction between the technical cause of action, and what Lindley, L.J., calls the "grievance" and "complaint"—the "cause of action in the wide sense, apart from all technicalities"; and they held that the substantial cause of action was the issuing of the prospectus, and that there was no ground for striking out any of the defendants. In giving judgment, Lindley, L.J., says that a contrary decision would revolutionize the practice, and that substantial justice would be sacrificed to a wretched technicality. It is also clear that if the contention in the case of the executors of the deceased director was correct, there might be judgment for the full £1000 damages claimed against the other defendants, and judgment for a smaller sum against the executors. Yet the cause of action against the latter and that against the other directors arose from the one original identical tort, namely, the issuing of a fraudulent prospectus, followed by damages, and the Court declined to allow the executors to be struck out.

I confess I regard this authority as singularly apposite in the circumstances of the present case, and all the more so as the General Orders to which I have referred are not specifically relied on for the decision, which was largely based on the established

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practice of the former Court of Chancery, and, since the Judicature Act, of the Chancery Division. If separate judgments involving distinct classes of ruling, and possibly different amounts of damages (as to which see *Dease's Case* (1)) against different defendants can be given in the Chancery Division, but not in the King's Bench Division, it would involve the inconsistency of different rules of procedure, and a different interpretation of the General Orders being applied in the two Divisions of the High Court. I may add that the *Frankenburg Case* (2) was followed in *The Kent Coal Company* v. *Martin* (3) in preference to *Gower* v. *Couldridge* (4), on the ground that conspiracy was the real and substantive cause of action.

Having, therefore, come to the conclusion that there was ample evidence to go to the jury, and that the judgment of the Chief Baron was right in point of form, the defendant's motion ought, in my opinion, to be refused.

R. ST. J. C.

Appeal. June 4, 5.

Condon appealed (5).

Matthew J. Bourke, K.C., Redmond Barry, K.C., and *George C. Green,* for the appellant.

The Solicitor-General (*Campbell, K.C.*), *O'Shaughnessy, K.C.,* and *T. Sullivan,* for the respondent.

THE COURT dismissed the appeal, and affirmed the judgment of the King's Bench Division, with costs.

Solicitor for the plaintiff: *A. Carroll.*
Solicitor for the defendant Condon: *R. Rice.*

R. D. M.

(1) 15 L. R. Ir. 356.
(2) [1900] 1 Q. B. 504.
(3) 16 T. L. R. 486.
(4) [1898] 1 Q. B. 348.

(5) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

MACNAGHTEN *v.* BAIRD (1).

K. B. Div. 1902.
Nov. 12.
Dec. 20.
Appeal. 1903.
Feb. 26, 27.

Prescription—Easement—Landlord and tenant—Right to take water from a well—Twenty years' user—Tenants of same landlord.

Prior to 1875 two holdings, of which M. was owner in fee, situate upon either side of a county road, were held together, and upon one of them there was a well. In 1875 the premises were divided, the part on one side of the road was let to G., who had since remained in possession, and was a judicial tenant to M., and the other part, containing the well, was retained by M. There was no agreement that G. was to be entitled to use the water of the well. There was a barn on G.'s part of the premises, which, in 1878, was converted into a dwelling-house, and this house was at first occupied by P., a cottier tenant of G., and subsequently by the defendant, who had been nineteen years in occupation as cottier tenant. Since 1878 P., and the defendant as his successor, had used the water of the well as of right, and had entered and walked over the portion of the land on which the well was for the purpose of approaching the well.

In an action of trespass against the defendant, a cottier tenant of G., the acts of trespass being committed in assertion of defendant's right to take water:—

Held (by Kenny and Wright, JJ., Barton, J., *dissentiente*), that the user by the defendant could be properly attributed to a lawful origin.

Held, by the Court of Appeal (reversing the judgment of the King's Bench Division), (1) that it was impossible to presume an implied grant of an easement in 1875 to G. in favor of the defendant and all future tenants of G.; and (2) that it was impossible to presume a lost grant by M. to G. by reason of the user of the well for twenty years.

CASE STATED by Gibson, J., on appeal at the Londonderry Summer Assizes for 1902.

This was an appeal by the plaintiffs from a dismiss without prejudice in an action for wrongfully breaking a pump and carrying away water. The premises were accurately shown on the plaintiff's map which was proved. The facts are as follows:—The premises held by Mr. Gilfillan and those on the other side of the road where the well in dispute is situate were, previous to

(1) In the King's Bench Division, before KENNY, BARTON, and WRIGHT, JJ.

K. B. Div. 1902.

MACNAGHTEN v. BAIRD.

1875, held together. On Gilfillan's part there were certain cottiers who in fact had been using the water of the well.

The premises (which are on Lord Macnaghten's estate) were in 1875 divided, the part on one side of the road being let to R. A. Gilfillan, who has since remained in possession as tenant, and now holds as judicial tenant to Lord Macnaghten.

On the occasion of the letting to Gilfillan no contract or representation on the landlord's part was proved that the tenant was to be entitled to use the water of the well. The well premises were retained by Lord Macnaghten in his own hands.

The house now occupied by the defendant was in 1875 a barn. In 1878 this barn was converted into a dwelling, which was occupied at first by Perry, a cottier tenant of Gilfillan, and since by the defendant, who has been for nearly nineteen years in occupation as cottier tenant.

Continuously since 1878 Perry and his successor, the defendant, have used the water in the well as of right.

The premises on Lord Macnaghten's side were reconstructed seventeen years ago, and a wall was built with an entrance gate in it to Moore's house, and a side gate leading to the offices and also to the well. This gate, though made for Moore's convenience, was used by Gilfillan's tenants, without objection, for the purpose of approach to the well.

The plaintiff (Moore) is a cottier tenant of Lord Macnaghten, and the plaintiff (Yates) is licensee of the latter under deed dated 5th June, 1900, authorised to take water from the well.

The acts of alleged trespass were done in assertion of the defendant's right to take water, and if he had, such rights were justified.

The plaintiffs' counsel contended that on the facts Gilfillan being a tenant only of Lord Macnaghten, and Lord Macnaghten having retained the well premises in his own hands, there could be no prescription or implication of lost grant.

For the defendant it was argued that the user should be attributed to a lawful origin by virtue of a lost grant, or as attached to Gilfillan's tenancy originally, or by some modification of the terms of the letting, which were parol, or in some other way conferring title.

The defendant's acts were done under Gilfillan's authority, no question was raised as to the character of the defendant's tenancy. The question for the opinion of the Court is, whether upon the facts the user could be properly attributed to a lawful origin. If it would, the dismiss should be affirmed, otherwise reversed.

Wylie, K.C., *Henry*, K.C., and *Chadwick*, for the plaintiffs.

Drummond, K.C., and *Horner*, for the defendant.

The arguments were in substance the same as those reported in the Court of Appeal *infra*.

KENNY, J. :— Dec. 20.

This comes before us on a case stated by Gibson, J., at the last Summer Assizes at Londonderry, in a civil bill appeal.

The action was one of trespass to a pump, and the defendant justified under an alleged right to take water from it.

There are three plaintiffs—(1) Moore, who is a cottier tenant of the servient tenement; (2) Yates, who is a licensee in respect of the water; and (3) Lord Macnaghten, who is the owner of the reversion—presumably in fee—on Moore's tenancy.

The defendant Baird is a cottier tenant on the holding of a man named Gilfillan, whose tenancy is a judicial one, and whose landlord is the plaintiff, Lord Macnaghten.

Before and up to 1875, both dominant and servient tenements were in the possession of Lord Macnaghten, and cottier tenants on what is now Gilfillan's holding were in the habit of taking water from the well on which the pump now stands.

In 1875, Lord Macnaghten made a letting to Gilfillan of lands, including those now comprised in the defendant's tenancy. Gilfillan is still in possession of that holding, and his tenancy has become a judicial one under the Land Act of 1881. On the occasion of that letting Lord Macnaghten retained in his own possession—either actually, or constructively through his cottier tenants—the lands of which the servient tenement is part.

In 1878, the occupant of the defendant's holding was a man

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named Perry, who held as cottier tenant to Gilfillan. About 1883, the defendant succeeded Perry as such cottier tenant.

The case finds as facts that "continuously since 1878 Perry and his successor, the defendant, have used the water in the well as of right."

It appears—though I do not regard it as material on the question on which we are asked to give an opinion—that about seventeen years ago the well premises were reconstructed and a side gate leading to the well was then erected, and that this gate, though erected for the convenience of the plaintiff Moore, was used by Gilfillan's tenants without objection, for the purpose of approach to the well.

The question put to us by the learned Judge is, whether upon the facts, the user of the well could be properly attributed to a lawful origin. If we think it can, the dismiss granted by the County Court Judge should be affirmed.

In dealing with this question of imputing a legal origin it seems to me that the circumstances of this case are stronger than those in *Hanna* v. *Pollock* (1). There the question of the right arose as between two termors, and though there may be no positive decision operating as a binding authority to the effect that one of two tenants of the common landlord can establish by the fiction of "lost grant" an easement affecting the holding of the other during the continuance of the tenancy in the latter—still, if the question arose here we would not, in my opinion, be justified in not following the well-considered and deliberate judgments of the majority of the Court of Appeal in that case. There the landlord was not bound. Here the question is, whether the landlord and his cottier tenant and his licensee are not all bound by the continuous user of the well "*as of right*" for over twenty years. If the cottier tenant Moore had been a tenant from year to year during all that period, *Hanna* v. *Pollock* (1) would have applied, though the landlord might not be bound, and we would have found a legal origin through the doctrine of lost grant as between Gilfillan and his sub-tenants on the one hand, and Moore, as Lord Macnaghten's tenant, on the other. I confess that I would be very slow to

(1) [1900] 2 I. R. 664.

extend that case to one in which the party claiming the right was merely a cottier tenant, though occupying that position for the full period of twenty years. I would also find it difficult, if not impossible, having regard to *Gayford* v. *Moffatt* (1), to hold that a tenant of one holding could by user acquire an easement *as against his own landlord* over another holding belonging to that landlord. But it is another question whether a grant cannot be implied from Lord Macnaghten to Gilfillan for him and his sub-tenants to take the water from the well. Let it be borne in mind that the sub-tenants on Gilfillan's holding were in the habit of using this well before 1875; that this particular holding of the defendant had been in existence since 1878—a period of twenty five years; that Lord Macnaghten, after the letting to Gilfillan in 1875, remained in the actual occupation of the well premises, and must be taken to have made no objection to the continuous exercise of the right claimed, and that fifteen years ago, when the well premises were reconstructed—presumably by either Lord Macnaghten or his tenant—a side gate leading to the well was erected which the defendant thereafter used without opposition. In these circumstances, why cannot a grant from Lord Macnaghten to Gilfillan for the occupants of his sub-tenants' holdings be implied? The inference may be drawn from the surrounding circumstances, notwithstanding that—as the "case" finds—no contract or representation was proved to have been made by the landlord on the occasion of the letting to Gilfillan in 1875, that the tenant was to be entitled to use the water of the well. It is not inconsistent with the terms of that yearly letting that Gilfillan may have stipulated for such a right for himself and any sub-tenants on his holding, and that the landlord may have then granted it. No doubt the particular dwelling-house in connection with which the right is claimed did not come into existence until 1878, but the grant might have been for the benefit of subsequent as well as present sub-tenants.

With these possibilities, I am of opinion that the user *could* be attributed to a lawful origin, and that the question put to us should be answered in the affirmative.

(1) L. R. 4 Ch. 133.

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BARTON, J. :—

I regret that I cannot agree with the decision at which the other members of the Court have arrived in this case. In my opinion the user by the defendant of this alleged easement cannot be referred to any legal origin, and the plaintiffs are entitled to a decree.

The material facts are as follows :—The civil bill was brought for trespass to lands. The defendant justified under an alleged easement or right to pass over the lands in question for the purpose of taking water from a well. There are several plaintiffs, including Lord Macnaghten, who is owner in fee of all the lands in question, *i.e.* both of the alleged servient tenement and of the alleged dominant tenement, and Robert Moore, a weekly cottier tenant, under Lord Macnaghten, of "the well-holding," as the holding is called within which the well is situate, and on which the alleged trespass was committed. The defendant William Baird is a weekly cottier tenant of one Gilfillan, who is a judicial tenant of Lord Macnaghten of a farm on the opposite side of the county road from the well. It appears that in 1875 Lord Macnaghten had all the lands in question on both sides of the road in his own possession, and in that year he let the farm on the other side of the county road to Gilfillan, retaining "the well-holding" in his own hands. In 1878 a barn on Gilfillan's farm was converted into a dwelling-house, and occupied first by a cottier tenant named Perry, and then by defendant. We are not informed when it was that Lord Macnaghten let "the well-holding" to the cottier tenant, Moore, but we know it was in Moore's possession seventeen years ago, when some work was done to the well. The learned Judge has found as a fact that for more than twenty years the defendant Baird and his predecessor in title, Perry, have used the water of the well "as of right," by which I understand that they have used it, not *clam vi* or *precario*, not by license or contract, but in assertion of a right to do so. The learned Judge finds that they were doing so under Gilfillan's authority. The question which is left for our decision is, whether upon these facts the user of defendant can properly be attributed to a legal origin. In my opinion the answer to that question must be in the negative.

Three possible legal origins have been suggested. *Firstly*, it was suggested that an easement might have been acquired by prescription. *Secondly*, it was suggested that in 1875 Lord Macnaghten may be presumed to have demised the farm on the other side of the road to Gilfillan, with this easement appurtenant to the demise. *Thirdly*, it was suggested that we ought to presume a lost grant either from the cottier tenant Moore to the cottier tenant Baird, or from Lord Macnaghten to Gilfillan. I shall deal with these three suggestions in the above order, and give my reasons for rejecting them.

In the first place, prescription is, I think, out of the case, because Lord Macnaghten was in possession of all the lands in question in 1875. There was complete unity of possession in Lord Macnaghten at that date. This puts an end to the possibility of a legal origin founded on prescription.

In the second place, I come to the suggestion that Lord Macnaghten may be presumed to have demised the farm on the other side of the road to Gilfillan, with this easement appurtenant to the demise. I understand that it was on this ground that the County Court Judge decided in favour of defendant. An implied demise of this kind cannot afford a defence to the defendant Baird in this case, unless it means an implied demise to Gilfillan, at the time of the letting to him in 1875, of a right for him and his cottier tenants, present and future, to pass over the lands in question, and take water from the well in question. That would be an extensive right. We could not infer an implied demise of that kind from user, unless there was a finding, or unless we could find, that such a right was necessary for the reasonable user of Gilfillan's holding, or, in other words, that Gilfillan's holding could not be conveniently enjoyed without it (see *Clancy* v. *Byrne* (1), and *Conlan* v. *Gavin* (2)). It is stated in the case that certain cottiers on the lands now held by Gilfillan did use the well before 1875, but there is no finding, and no evidence to support a finding, that this alleged right for Gilfillan and his cottiers, present and future, to take water from this well was so necessary for the reasonable use of Gilfillan's holding as to be essential for the convenient enjoyment

(1) I. R. 11 C. L. 355. (2) 9 I. L. T. R. 198.

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of the farm. In my opinion, in the absence of such a finding and of such evidence, we cannot hold that there was an implied demise to Gilfillan, in 1875, of this easement as appurtenant to his holding.

There remains the third question—whether this user can be attributed to a lost grant. I think it cannot. In my opinion this becomes tolerably clear if we bear in mind the facts of the case and the principles on which a lost grant may be presumed. It was suggested, on the authority of *Hanna* v. *Pollock* (1), that a lost grant might be presumed from Moore, the weekly cottier tenant of Lord Macnaghten, to Baird, the weekly cottier tenant of Gilfillan. It is not necessary to consider whether such a presumption is possible legally, because the facts of this case do not lay the foundation for such an argument. In the first place, there is no finding and no evidence that Moore's cottier holding had been in existence for twenty years, and no grant could be presumed from twenty years' user unless the servient tenement had been in existence for that period. In the second place, the case finds that Baird exercised his alleged right, not on his own behalf, but under Gilfillan's authority; so that, if a lost grant is to be presumed at all, Gilfillan must be the grantee, and Gilfillan's holding must be the dominant tenement. This was recognised by Mr. Horner, who argued the case for the defendant on the basis of a lost grant from Lord Macnaghten to Gilfillan. But in my opinion it is not possible in law to presume a lost grant of that kind from a landlord to his tenant. Such an easement, if granted by Lord Macnaghten, must bind the fee, and it is repugnant to our law to suppose that a tenant of a holding under a landlord can acquire by user an easement attached to his holding as against his landlord over the lands of his own landlord. I understand this to be the effect of the decision in *Gayford* v. *Moffatt* (2), a case in which Lord Cairns gave the judgment in the House of Lords, and described such a supposition as an utter violation of the first principles which regulate the relation of landlord and tenant. *Gayford* v. *Moffatt* (2) is quite consistent with the judgment of the majority of the Court of Appeal in *Hanna* v.

(1) [1900] 2 I. R. 664. (2) L. R. 4 Ch. 133.

Pollock (1). In the latter case, Walker, L.J., at p. 699, was careful to point out that the view of the majority of the Court of Appeal in that case did not in the least invade the doctrine of *Gayford* v. *Moffatt* (2).

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For these reasons, I think that the learned Judge's question ought to be answered in the negative, and that the plaintiffs are entitled to a decree.

WRIGHT, J. concurred in the judgment of KENNY, J.

J. L.

The plaintiffs appealed (3).

Appeal. 1903. Feb. 26, 27.

Wylie, K.C., *Henry, K.C.*, and *Chadwick*, for the appellants:—

It is impossible to presume a lost grant in this case unless it was given for the benefit of all the cottier tenants, both present and future, of Gilfillan. When a landlord creates this right, it is either an implied grant for all cottier tenants, or for all existing and future tenancies. The lessee of one close cannot, as such, by user acquire an easement over another close belonging to the same landlord: *Gayford* v. *Moffatt* (2). If Lord Macnaghten had intended to create an easement of this description at the time of the letting to Gilfillan, there would have been an express grant: in the absence of such express grant, there can be no easement acquired by user: *Deeble* v. *Linehan* (4); *Wilson* v. *Stanley* (5); *Begyan* v. *M'Donald* (6); *Timmons* v. *Hewitt* (7); *O'Kane* v. *O'Kane* (8); *Hanna* v. *Pollock* (1); *Polden* v. *Bastard* (9); *Russell* v. *Harford* (10); *Thomson* v. *Waterlow* (11); *Watts* v. *Kelson* (12).

(1) [1900] 2 I. R. 664.
(2) L. R. 4 Ch. 133.
(3) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.
(4) 12 I. C. L. R. 1.
(5) *Ibid.* 345.
(6) 2 L. R. Ir. 560.
(7) 22 L. R. Ir. 627, 641.
(8) 30 L. R. Ir. 489.
(9) L. R. 1 Q. B. 160.
(10) L. R. 2 Eq. 507.
(11) L. R. 6 Eq. 36.
(12) L. R. 6 Ch. 166.

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Horner (with him *Drummond, K.C.*), for the respondent:—

By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, which have been used therewith: *Wheeldon* v. *Burrows* (1); *Sturges* v. *Bridgman* (2).

Baird's holding was really Gilfillan's, and the lost grant was to Gilfillan and his tenants. Part of this letting to Gilfillan was the right to draw water from the well.

There was evidence to show that this user could be ascribed to a lawful origin, and was enjoyed as of right: *Clancy* v. *Byrne* (3); *Bayley* v. *Marquis of Conyngham* (4).

Feb. 27.

FITZ GIBBON, L. J.:—

Though this matter comes before us on a case stated, some of the facts are left in doubt.

The alleged dominant and servient tenements are on the opposite sides of a country road, and the case finds that both "were previous to 1875 *held together*"; but how they were so held, and whether by tenants or by the owner in fee, the case does not state. Kenny, J., assumed that "before and up to 1875 both tenements were in the possession of Lord Macnaghten."

The case finds that they "were in 1875 divided," the dominant tenement "being let to Gilfillan, who has remained in possession as tenant, and now holds as judicial tenant to Lord Macnaghten," and the servient tenement being "retained by Lord Macnaghten in his own hands."

It is expressly found that "on the occasion of the letting to Gilfillan no contract or representation on the landlord's part was proved that the tenant was to be entitled" to the easement now claimed. If there had been no change in the occupation since 1875, we should have the alleged servient tenement still in the possession of the owner in fee, he being still the landlord of the alleged dominant tenement, which would be held by his tenant without evidence of any contract or representation which could

(1) 12 Ch. D. 31.
(2) 11 Ch. D. 852.
(3) I. R. 11 C. L. 355.
(4) 15 I. C. L. R. 406.

give title to the easement claimed, and if *Gayford* v. *Moffatt* (1) be law, it would, in the words of Lord Cairns, be "an utter violation of the first principles of the relation of landlord and tenant" to hold that by mere user the tenant could acquire an easement over his landlord's property.

We must, therefore, see whether any facts are stated with regard to the servient tenement, which in 1875 the landlord "retained in his own hands," by which the alleged easement could be created. We are left very much in the dark as to how and when the premises "on the other side of the road where the well in dispute is situate" ceased to be "held together" with "the premises held by Mr. Gilfillan." "Previous to 1875, on Gilfillan's part there were certain cottiers, who had in fact been using the water of the well." But the landlord is assumed to have had the possession when he made the letting to Gilfillan in 1875, and if so, this user can have given no right as against him.

"The house now occupied by the defendant was in 1875 'a barn,' which in 1878 was converted into a dwelling, which was occupied at first by Perry, a cottier tenant of Gilfillan, and since by the defendant Baird, who has been for nearly nineteen years in occupation as cottier tenant," and "continuously since 1878 Perry and his successor, the defendant, have used the water in the well as of right." This is all that we know of the dominant tenement.

The facts as to the servient tenement are stated in paragraphs 7 and 8 of the case. "The premises on Lord Macnaghten's side were reconstructed seventeen years ago, and a wall was built with an entrance gate in it to Moore's house, and a side gate leading to the offices, and also to the well. This gate, though made for Moore's convenience, was used by Gilfillan's tenants without objection, for the purpose of approach to the well. The plaintiff Moore is a cottier tenant of Lord Macnaghten." A "cottier tenant" is none the less an occupier, and if Moore had had possession of the servient tenement for twenty years, during which there had been user as of right, the case would be the same as *Hanna* v. *Pollock* (2), and according to the opinions of the majority

(1) L. R. 4 Ch. 133. (2) [1900] 2 I. R. 664.

Appeal. 1903. MACNAGHTEN v. BAIRD. Fitz Gibbon, L.J.

in that case, this action could not be maintained so long as Moore's tenancy lasted. It is only by assuming what the case does not state—*viz.* that the landlord, and not his tenant Moore, has had the actual possession within twenty years—that this case can be distinguished from *Hanna* v. *Pollock* (1), and, therefore, I assume, though the case does not so state, that Moore has not been in occupation as tenant for twenty years, or that he was a mere licensee whose possession or occupation was that of his master, or employer, Lord Macnaghten, the "landlord."

No user of water for the house for which it is now claimed can have existed until 1878, three years after the letting to Gilfillan, when the building was first converted into a dwelling. But from 1878—for more than twenty years continuously before action—the case finds user as of right by the successive occupiers of this dwelling, and finds this user to have been "without objection." Under these circumstances, can a lawful origin be presumed for an easement binding the defendant's landlord, who is owner in fee of the well; his "cottier tenant," who occupies the site of the well and of its approaches and gates; and a licensee by deed of the landlord?

I believe that we are all agreed—I, at all events, am clearly of opinion—that such an easement could have no origin except a deed. The right could not have accrued to Gilfillan upon the letting in 1875, there being no evidence of any contract or representation entitling him to it, and it being unnecessary for the enjoyment of his tenancy in what was then only a barn. If it be regarded as having been, in 1875, intended to arise for any house thereafter to be erected, this would be a future right, and the intention to confer it could only be evidenced by deed. We must, therefore, presume a "lost deed," if we are to uphold the decision under appeal. What deed is to be presumed? It must be a deed between Lord Macnaghten and Gilfillan, or some other tenant of the dominant tenement, executed either in 1875, or in or about 1878. If executed in 1875, it would have been a deed collateral to a parol letting, granting or covenanting to grant to Gilfillan, and his successors in tenancy, the right for

(1) [1900] 2 I. R. 664.

themselves and their future cottier tenants to draw water from the well on the landlord's property for each and every house for the time being on Gilfillan's holding. Such a presumption would be in the teeth of *Gayford's Case* (1).

It only remains to consider the possibility of presuming a grant in or about 1878, when the barn was converted into a dwelling. Such a grant should be made, not to Gilfillan, but to the tenant of the house; but whether to Gilfillan or to his sub-tenant, no consideration or motive for it can be suggested, and when Lord Cairns held it to be a violation of first principles to presume the creation of a right against a landlord in favor of his own tenant under such circumstances, what are we to say of presuming it in favor of a "cottier tenant" of that tenant?

Mr. Henry has suggested that this case was stated for the purpose of obtaining a decision whether the principle of *Timmons* v. *Hewitt* (2) can be extended to make the presumption from twenty years user against a landlord, owner in fee, which in that case was made against a termor. I am in no difficulty upon this, for I have expressed my opinion in *Hanna* v. *Pollock* (3), that the principle cannot be sustained against a termor without making the law of prescription different in Ireland from what it is in England, and to extend it to an owner in fee, *Gayford's Case* (1), as well as *Bright* v. *Walker* (4), must be repudiated in this country. But this case brings out the startling result, if the principle be right, but applicable only against a termor, that user of a way well or bog for twenty years by the occupying tenant of adjoining or neighbouring land belonging in fee to his landlord raises no presumption, and can create no right, as against the owner in fee, who not only could, but would be likely to make an actual grant, whereas precisely identical user of the same road well or bog, if it were on tenanted land, would raise the presumption of a grant against the occupier of the alleged servient tenement, notwithstanding that he had no power to make it as against his landlord, and would create a right lasting as long as the tenancy subsisted. If the tenancy subsequently became a perpetuity—by conversion into a judicial tenancy, or

(1) L. R. 4 Ch. 133.
(2) 22 L. R. Ir. 627, 641.
(3) [1900] 2 I. R. 664.
(4) 1 C. M. & R. 211.

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by purchase of the fee by the occupying tenant, or possibly even on surrender—the land would be burdened for ever with an easement which could not have bound, or existed against, the original owner in fee, and which, therefore, could not affect the value of his interest, or the price payable to him, in respect either of the dominant or of the servient tenement.

This must be considered whenever *Timmons* v. *Hewitt* (1), and the opinions expressed in *Hanna* v. *Pollock* (2), come to be finally discussed, but for the present it is enough to say that I believe we are all agreed that, consistently with *Gayford's Case* (3), no lawful origin can be presumed against the landlord for the easement claimed here. Where a tenant becomes the occupier of part of his landlord's estate under a contract or demise, any beneficial user of another part of the same estate, by way of easement or *profit à prendre*, which the tenant actually enjoys outside his holding, and beyond the terms of his letting, is not to be attributed to any voluntary, subsequent, or additional "lost grant" from his landlord, but must be attributed to permission, in the absence of evidence of actual grant, or of express title, or of forty years user at the least.

In my opinion the question must be answered in the negative, and the case must be remitted to the Judge, that the dismiss may be reversed, and a decree made in favor of the plaintiffs.

WALKER, L. J.:—

There are two questions in the case—(1.) Can we presume in 1875 an implied grant of an easement to Gilfillan for Baird, and all other future tenants of Gilfillan? and (2.) Whether we can presume a lost grant by Lord Macnaghten by reason of the user by Baird for twenty years under the state of the title proved.

Taking the first—I think the answer must be in favor of the plaintiffs. A grant of an easement to Gilfillan and future tenants must be express, and by deed. An implied grant would be the affirmation of an existing right through user creating an easement; no such user for Gilfillan and future tenants did or could

(1) 22 L. R. Ir. 627, 641. (2) [1900] 2 I. R. 664. (3) L. R. 4 Ch. 133.

exist. If there be an apparent and continuing easement existing by user, and a landlord lets to a tenant, making a division of the tenement, there will be an implied grant of the easement as well as of the subject of the grant to which it is attached. If the argument of the defendant be right, an additional servitude would be imposed here in respect of Baird's house, and if Gilfillan built a row of twenty cottier houses, the well at Moore's would have to supply them all.

As to the other question, both the Chief Baron in *Timmons* v. *Hewitt* (1), and I myself in *Hanna* v. *Pollock* (2), stated that the doctrine of a lost grant, therein referred to, did not apply against the landlord. That is the effect of *Gayford* v. *Moffatt* (3). In *Clancy* v. *Byrne* (4), Lawson, J., said:—"It has been settled by several cases, of which *Gayford* v. *Moffatt* (3) is an example, that a tenant cannot by user during his tenancy acquire a right over the adjoining close belonging to his own landlord. Nor can the tenant in this case make out a title to this right of way as appurtenant to these lands by prescription under the Prescription Act. These propositions were not disputed by the plaintiff's counsel, but it was argued that from the user the jury might find a lost grant. I do not well see how such a presumption of a lost grant could be made in this case, because before the tenancy of the plaintiff's grandfather both closes were in the possession of the landlord; and if any ancient right of way had previously existed, it would have been extinguished by unity of possession and title in the landlord. The grant, if it be presumed at all, must be presumed to have been made at or after the time the tenancy of the plaintiff's grandfather commenced: and it would be a very violent presumption indeed that, when the tenancy was created by parol, a distinct deed of grant of an easement should be presumed, and if a grant were to be presumed, it should be presumed to be a grant for ever, which would be quite inconsistent to presume as being made to a yearly tenant."

This last point is therefore covered by authority.

(1) 22 L. R. Ir. 627, 641.
(2) [1900] 2 I. R. 664.
(3) L. R. 4 Ch. 133.
(4) I. R. 11 C. L. 358.

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HOLMES, L. J. :—

It is, I think, the law that a tenant by user commencing after the creation of the tenancy cannot acquire an easement over lands belonging to and in the possession of his landlord. Such user can neither confer a title by prescription, nor raise the presumption of a lost grant. In *Hanna* v. *Pollock* (1), Walker, L.J., and I held that from user as of right by a termor for twenty years over the lands of another termor a lost grant ought to be presumed. We endeavoured to show that this was considered to be the law in both England and Ireland up to the passing of the Prescription Act, and that no change was made by that statute. The distinction, however, between that case and a case where the lands sought to be onerated with the easement are in the possession of the landlord was present to our minds; and *Gayford* v. *Moffat* (2) was not only referred to by counsel, but also mentioned by my brother Walker in his judgment. It may be said that this distinction is illogical. If it is, we cannot help it. The doctrine of lost grant is artificial. We must take it as we find it; and while we ought not to curtail it, it is not our province to extend it. At the same time, I may say that there is sound reason in holding that as it is the possession given by the landlord which makes the user possible, it cannot be relied on to establish a right against him. In the present case, if the user that is the foundation of the alleged right began with the tenancy, and continued since without interruption, it might be inferred that the right to use the way for the more convenient enjoyment of the lands was included in the demise; but it is clear that the user began at a later date, and no such inference is possible.

Solicitor for the appellants: *C. R. Tillie.*
Solicitor for the respondent: *P. Maxwell.*

R. D. M.

(1) [1900] 2 I. R. 664. (2) L. R. 4 Ch. 133.

THE KING (THOMAS FERRIS) *v.* JUSTICES OF LONDONDERRY (1).

K. B. Div.
1903.
June 12.

*Board of Guardians—Right to prosecute man for neglecting to maintain his wife—Corporation—Common informer—Justices—*10 *&* 11 *Vict. c.* 84, *section* 2.

A Board of Guardians (which is a body corporate) prosecuted F. at Petty Sessions for wilfully neglecting to maintain his wife, so that she became destitute, and was relieved in their workhouse. F. was convicted:—

Held, without deciding whether or not a criminal prosecution could be instituted by a corporation as common informers, that the conviction should be upheld, since the Guardians were in the present case not common informers, but parties aggrieved.

CERTIORARI.

The prosecutor was charged under 10 & 11 Vict. c. 84, s. 2, before the Justices at Petty Sessions, on a summons in which the Guardians of the Poor of Limavady Union were complainants, with having wilfully neglected to maintain his wife, so that she became destitute, and was relieved in the Limavady Workhouse; and was convicted and ordered to be imprisoned for fourteen days with hard labour. The prosecutor having obtained a conditional order for a writ of *certiorari* to remove and quash the conviction on the ground (*inter alia*) (2) that the Guardians, being a corporate body, could not act as complainants in the matter of the complaint, which should have been made by a common informer, now applied to make the order absolute, notwithstanding cause shown.

Horner (with him *Henry, K.C.*), for the prosecutor:—

A corporation cannot sue as a common informer unless ex-

(1) Before PALLES, C.B., and ANDREWS, BARTON, and WRIGHT, JJ.

(2) Another ground relied on was that the prosecutor's wife was not, on the facts proved, a destitute poor person within the meaning of the Act; but the case is not reported on this point.—[REP.]

K. B. Div. 1903.

THE KING (FERRIS) v. JUSTICES OF L'DERRY.

pressly authorised by statute so to do: *Guardians of St. Leonard's, Shoreditch* v. *Franklin* (1); *Weaver's Company* v. *Forrest* (2); Chitty's Archbold, 14th ed., p. 1050. Boards of Guardians were made corporate bodies by 1 & 2 Vict. c. 56, s. 27, but nowhere are they authorised to prosecute. The proper course here would have been to have brought the prosecution in the name of the relieving officer: Mooney's Poor Law, pp. 407, 8. [He referred to 18 Eliz. c. 5, s. 7; 31 Eliz. c. 5.]

Matheson, *K.C.*, and *Wylie*, *K.C.*, for the Guardians, were not called upon.

PALLES, C.B.:—

I doubt whether the case cited, *Guardians St. Leonard's, Shoreditch* v. *Franklin* (1), has any application here. It was a civil action for a penalty. The proceeding before the Justices here was a criminal prosecution. It is, however, unnecessary to determine this, as the Guardians here are, under 10 & 11 Vict. c. 84, s. 2, not common informers, but parties aggrieved.

As to the second point, there was evidence before the Justices, upon which they might have decided either way, either that the wife was, or was not, destitute. In such a case the decision of the Justices is not reviewable upon *certiorari*. Our only function in such a case is to determine whether there was *any* evidence sufficient to support the conviction. If there was, we cannot consider the weight of it.

ANDREWS, BARTON, and WRIGHT, JJ., concurred.

Solicitor for the prosecutor; *William Horner*.
Solicitors for the Limavady Guardians: *B. J. Lane & Co.*

J. G. T.

(1) 3 C. P. D. 377. (2) 2 Str. 1241.

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2. —— *Poor Law—Guardians—Accounts, audit of—Local Government Board auditor—Duties and powers of*—10 *Vict. c.* 31, *s.* 1.] A Local Government Board auditor, when auditing the accounts of a board of guardians, being dissatisfied

AUDITOR—*continued.*
as to the legality of the payment of a sum of money granted by the guardians as outdoor relief to a widow, aged fifty-four, on the ground that she was permanently incapacitated for work, called for a medical certificate, or other evidence, to show that she was unable to work. The guardians had acted on the statement of their relieving officer, in making the allowance, and declined to give further evidence. The auditor surcharged them with the payment. On an application by the guardians for a writ of *certiorari* to quash the surcharge by the auditor:—*Held* (affirming the decision of the King's Bench), that it was within the powers of the auditor, and that it was his duty, to call for further evidence in the case, and such evidence not having been given, that the surcharge was right. *R.* (*Ferguson*) v. *More O'Ferrall* - - - - - App. 141

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2. —— *Defence Acts—Artillery range and camp—Lands taken compulsorily—Compensation—Other lands of owner injuriously affected—Loss of privacy—Apprehended trespass—Injury to fishery—Injury to incorporeal hereditament.*] Where lands are compulsorily taken, under the Defence Code, for use as a camp and artillery range, compensation may be allowed for depreciation in value of other lands of the same owner not taken, resulting from the natural and ordinary use of the lands taken as such camp and range. View taken by the Queen's Bench Division in *Reg.* (*Moore*) v. *Abbott* ([1897] 2 Q. B. 362) adopted. In estimating such compensation regard may be had to loss of privacy and amenity, and the vulgarization of the neighbourhood, by the establishment of a camp, but not to loss or injury from apprehended trespass by soldiers or their friends to other lands of the same owner. Compensation may be allowed for injury, caused by the nature of the artillery range, to a fishery attached to the ownership of the lands not taken. *Semble*: Compensation may be allowed for injury to an incorporeal hereditament, such as a several fishery. *In re Ned's Point Battery* K. B. 192

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COSTS—*continued.*

2. —— Habeas corpus—*Infant—Jurisdiction to order payment of costs to successful applicant—Supreme Court of Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *ss.* 53, 65.] Under section 53 of the Judicature (Ireland) Act, 1877, the Court, when granting an application for *habeas corpus*, has jurisdiction to order payment by the respondent of the costs of the application. *In re Proctor* K. B. 117

3. —— *Taxation—Same solicitor appearing for two defendants—Judgment for one defendant, with costs—Disagreement of the jury as to the other defendant.*] Where, in an action of contract, two defendants appear, and defend by one solicitor, and judgment with costs is entered for one of such defendants, the jury disagreeing as to the other, the successful defendant is only entitled to an aliquot portion of the general costs of the defence, notwithstanding that the action is undetermined as to the remaining defendant. *M'Gowan* v. *Hamilton* K. B. 311

—— Civil Bill decree—Aggregate exceeding £20
See CERTIORARI. [177

—— Committal order—Debtors Act - 557
See DEBTORS ACT, 1872. 1.

—— Depriving successful party of - 589, 623
See MASTER AND SERVANT.

—— Lien—Charging order - - - 287
See SOLICITOR'S LIEN.

—— *Scire facias*—No relator—Judgment for defendant - - - - - 474
See SURETY.

COUNTY COUNCIL—Compulsory purchase—Accommodation works - - - 317
See COMPULSORY PURCHASE. 1.

—— Infirmary—Property of—Vesting - 324
See COUNTY INFIRMARY.

—— Transfer of officer—Scheme—Remuneration—Compensation - - - - 670
See EXISTING OFFICER. 2.

COUNTY COURT — Decree — Costs bringing amount to over £20 — Renewal — Certiorari - - - - - 177
See CERTIORARI.

—— Judge of—Powers at Licensing Sessions 671
See LICENSING ACTS. 2.

—— Loan Fund Society — Promissory note — 6 & 7 Vict. c. 91 - - - - 290
See LOAN FUND SOCIETY. 2.

COUNTY INFIRMARY — *County Council—Vesting of property in County Infirmary—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *section* 15—*Schedule to Application of Enactments Order*, 1898, *Art.* 15—5 *Geo.* 3, *c.* 20, *and amending Acts.*] The property in a County Infirmary is, by the effect of Art. 15 (1) of the Schedule to the Local Government (Application of Enactments) Order, 1898, vested in the County Council of the county. *In re Tyrone Infirmary* [K. B. 324

COVENANT — Lease — Rates — County and district charges - - - - 490
See RATES.

CRIMINAL LAW—Inciting to intimidation—Crimes Act, 1887—Summons—Proclamation—*Dublin Gazette*—Evidence—Newspaper—Circulation - - - 146
See INCITEMENT.

CROWN—Judgment against—Costs - - 474
See SURETY.

CURTESY—*Estate by—Wife never in actual seisin—Judgment in ejectment, with stay of execution—Fee-farm grant—Renewable Leasehold Conversion Act* (12 & 13 *Vict. c.* 105), *sect.* 9.] *R. H.*, who held certain lands under a fee-farm grant, made in pursuance of the Renewable Leasehold Conversion Act, granted them by deed to his daughters *M.* and *L.*, as tenants in common in fee, but continued himself in possession. *M.* married *P.*, and a son was born of the marriage. An ejectment was brought by *M.* and *L.* against *R. H.* and others to recover the lands, and, by consent, judgment was entered, with a stay of execution during the lifetime of *R. H.*, and he remained in possession until his death. *M.* died intestate during the lifetime of *R. H.* without ever having been in possession. *R. H.* having died, *P.*, claiming as tenant by the curtesy, applied to be added as a plaintiff in the ejectment proceedings:—*Held*, that, notwithstanding the consent judgment for possession, with stay of execution, there was no sufficient actual seisin in *M.* to entitle *P.* to an estate by the curtesy. *Dictum* in *Robins* v. *M'Donnell* (3 L. R. Ir. 391), as to the effect of the Renewable Leasehold Conversion Act, sect. 9, observed upon by Gibson, J. *Parks* v. *Hegan* - - K. B. 643

CUSTOM—Of port—Delivery of cargo - 657
See SHIP.

DAMAGE—Particular—Public right of way—Obstruction - - - - - 45
See WAY.

—— Remoteness—Negligence in keeping bees 573
See NEGLIGENCE. 1.

—— Severance of damage—Separate causes of action—Joinder of defendants - 681, 730
See CONSPIRACY.

DEBTORS ACT, 1872 — *Practice — Committal order—Order XLIV., Rule* 4—*Several instalments in arrear—Costs of committal order—Sheriff's fee.*] A committal order, where the defendant has made default in paying instalments directed to be paid by him to the plaintiff in discharge of a judgment debt, should, as a general rule, be made for a single instalment, even though several instalments are in arrear. The Court has power, in its discretion, to make the payment of the costs as well as of the instalment a condition of the debtor's discharge from prison. *Smith* v. *Hamil-*

DEBTORS ACT, 1872—*continued.*
ton (33 I. L. T. R. 91) overruled on this point. *Semble*: The payment by the debtor of the sheriff's fees for executing the committal order should not be made a condition of the debtor's discharge. *M'Taggart* v. *Howard* - - - APP. 557

2. —— *Practice—Order to pay judgment debt by instalments—Default in payment of instalment—Committal order — Officer in the army — Public policy.*] A committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor by instalments will be granted against the debtor, though he is an officer in the army, and the only income of which he is proved to be in receipt is his pay as such officer. *Hamilton* v. *Coningham*
[K. B. 564; APP. 569

DEDICATION—Public right of way—Substitution—Limited owner - - - 45
See WAY.

DELIVERY OF CARGO—Custom of port 657
See SHIP.

DISCHARGE OF SURETY—Alteration in office and duties of principal debtor 474
See SURETY.

DISCOVERY — Interrogatories—Ejectment on title—Plan of possession . - 118
See INTERROGATORIES.

DISQUALIFICATION — *Local Government—Schedule to Local Government (Application of Enactments) Order, 1898, articles 9 (1), 12 (11)—Criminal law—Justices—Summary jurisdiction.*] By article 12, sub-article 11, of the schedule to the Local Government (Application of Enactments) Order, 1898, any person who acts "when disqualified" under that Order, is liable on summary jurisdiction to a fine:—*Held*, that the sub-article did not apply to the case of a person who, being qualified, was elected guardian of a board of guardians, and acted as such without having taken the declaration required by article 9 of the schedule. *R.* (*Prunty*) v. *Justices of Longford*
[K. B. 677

DISTRICT COUNCIL—Chairman—Expiration of office—Competency to act as Justice of the Peace - - - - - 101
See JUSTICES. 1.

DISTURBERS OF THE PEACE—Exertions to bring to justice—Maiming- - 445
See PEACE OFFICERS.

DIVORCE—*Nullity of marriage—Domicile of respondent—Act on petition—Jurisdiction.*] The Court has jurisdiction, in a suit for a decree of nullity of marriage, to determine the validity of a marriage contracted in Ireland, irrespective of any question as to the respondent's domicile or place of residence. In a suit for a divorce *a mensa et thoro*, in order to give the Court jurisdiction, it must be shown either that the respondent's

DIVORCE—*continued.*
domicile was Irish when the suit was instituted, or that he had a sufficient residence in Ireland to give the Court jurisdiction to grant such relief. A petition was presented for a decree of nullity of marriage on the ground of the previous marriage of the respondent with a wife still alive; and in the alternative, for a divorce *a mensa et thoro* on the ground of adultery and cruelty. The so-called marriage took place in Ireland, where the petitioner was domiciled and resided. The respondent, who was originally domiciled in Ireland, was served with the citation in England, and filed an act on petition, objecting to the jurisdiction of the Court on the ground that he was domiciled and resident in England. The Court, on the evidence, held that the respondent had abandoned his English domicile, and reverted to his Irish domicile of origin, and that his domicile was Irish both at the time of the marriage with the petitioner, and at the commencement of the suit, and overruled the act on petition. *Sproule* v. *Hopkins*
[K. B. (MAT.) 133

DOCK—Employment of labourer within 163, 522
See WORKMAN. 1, 2.

DOMICILE—Divorce—Jurisdiction - - 133
See DIVORCE.

DUBLIN GAZETTE — Proclamation — Evidence - - - - - - 146
See INCITEMENT.

EASEMENT — *Prescription — Landlord and tenant—Right to take water from a well—Twenty years' user—Tenants of same landlord.*] Prior to 1875 two holdings of which *M.* was owner in fee, situate upon either side of a county road, were held together, and upon one of them there was a well. In 1875 the premises were divided, the part on one side of the road was let to *G.*, who had since remained in possession, and was a judicial tenant to *M.*, and the other part, containing the well, was retained by *M.* There was no agreement that *G.* was to be entitled to use the water of the well. There was a barn on *G.'s* part of the premises, which, in 1878, was converted into a dwelling-house, and this house was at first occupied by *P.*, a cottier tenant of *G.*, and subsequently by the defendant, who had been nineteen years in occupation as cottier tenant. Since 1878 *P.*, and the defendant as his successor, had used the water of the well as of right, and had entered and walked over the portion of the land on which the well was for the purpose of approaching the well. In an action of trespass against the defendant, a cottier tenant of *G.*, the acts of trespass being committed in assertion of defendant's right to take water:—*Held* (by Kenny and Wright, JJ., Barton, J., *dissentiente*), that the user by the defendant could be properly attributed to a lawful origin. *Held*, by the Court of Appeal

EASEMENT—*continued.*
(reversing the judgment of the King's Bench Division), (1) that it was impossible to presume an implied grant of an easement in 1875 to *G.* in favour of the defendant and all future tenants of *G.*, and (2) that it was impossible to presume a lost grant by *M.* to *G.* by reason of the user of the well for twenty years. *Macnaghten* v. *Baird* [K. B. 731; App. 739

ESTATE BY CURTESY.
See Curtesy.

EVIDENCE — Accounts — Audit — Power and duties of Local Government Board auditor - - - - - - - 141
See Auditor. 2.

—— Circulation of newspaper — Proclamation under Crimes Act, 1887—Dublin Gazette —Inciting to intimidation - 146
See Incitement.

—— Custom of port—Charter party - 657
See Ship.

EXECUTOR DE SON TORT — Promissory note to Loan Fund Society—Death of maker - - - - - - 290
See Loan Fund Society. 2.

—— Possession by - - - - - - 95
See Limitations, Statute of.

EXISTING OFFICER—*Local Government Act —Poor-rate collector—Public Health Act,* 1878, *sect.* 7—*Urban sanitary district, formed subsequent to Local Government Act—Provisional Order—Loss of income—Compensation.*] At the time of the passing of the Local Government Act *O'M.* was a poor-rate collector for the electoral division of Westport, in the county of Mayo. This electoral division consisted of two parts, the rural electoral division and the urban electoral division. By virtue of the passing of the Act *O'M.* became an existing officer of the Mayo County Council. In November, 1899, subsequently to the passing of the Local Government Act, the Town Commissioners of Westport obtained a Provisional Order (which was subsequently confirmed by statute), whereby the town of Westport was formed into an urban sanitary district, in pursuance of the provisions of the Public Health Act, 1878. They advertised for a rate collector for the newly constituted urban sanitary district. *O'M.* offered to collect the rates for 7*d.* in the £1, and *H.* offered to act as collector at a smaller salary. *H.'s* offer was accepted, and *O'M.* applied to the council of the urban sanitary district for compensation for loss of office. The council refused. *O'M.* then applied to the King's Bench Division for a mandamus to direct the council to award him compensation:—*Held* (affirming the decision of the King's Bench Division), that the loss of income was not in consequence of the passing of the Local Government Act, and that *O'M.*

EXISTING OFFICER—*continued.*
was not entitled to compensation. *R.* (*O'Malley*) v. *Westport Urban District Council* - K. B. 179

2. —— *Poor-rate collector—Transfer to County Council — Scheme — Remuneration — Compensation.*] Judgment of Court of Appeal, [1902] 2 I. R. 637 *sub nom. R.* (*M'Kay*) v. *Local Government Board for Ireland* reversed. *Local Government Board for Ireland, Appellants*; *M'Kay, Respondent* H. L. 670

FACTORY—Workmen's Compensation Act, 1897, sect. 7 - - - - - 511, 522
See Workman. 2, 3.

FALSE IMPRISONMENT—Implied authority of servant - - - 589, 623
See Master and Servant.

FANCY NAME—Action against firm 589, 623
See Master and Servant.

FEE-FARM GRANT—Dedication of public right of way by grantee - - 45
See Way.

—— Renewable Leasehold Conversion Act, s. 9
See Curtesy. [643

FISHERY—Injury to—Compulsory purchase—Rifle range - - - - - 192
See Compulsory Purchase. 2.

FISHERY ACTS—(26 & 27 *Vict. c.* 114, *s.* 6; 32 & 33 *Vict. c.* 92, *s.* 16)—*Fixed engine—Certificate of inspectors—Engine not corresponding in description with certificate.*] The certificate of the Fishery Commissioners, given pursuant to 26 & 27 Vict. c. 114, s. 6, affords no defence to a prosecution for erecting or using a fixed engine for fishing, contrary to 32 & 33 Vict. c. 92, s. 16, unless the fixed engine so erected or used is, in "situation, size, and description," in conformity with the certificate. *Hosford, Appellant*; *M'Auliffe, Respondent* [K. B. 1

FIXED NET—Not corresponding in size with certificate - - - - - 1
See Fishery Acts.

FRANCHISE—Parliamentary.
See Parliament.

FRAUD—Sale of cattle—Hermaphrodite 463
See Hermaphrodite.

GENERAL ISSUE—Pleading - - 517
See Revenue.

GOOD CHARACTER—Publican—Violation of undertaking - - - 429, 440
See Licensing Acts. 1.

GUARDIAN OF THE POOR—Acting while disqualified—Liability to fine - 677
See Disqualification.

—— Prosecution for not maintaining wife 747
See Poor Law.

HABEAS CORPUS—Infant—Costs—Jurisdiction to award - - - - - 117
See Costs. 2.

HERMAPHRODITE—*Contract of sale—Sale of hermaphrodite animal — Parties not* ad idem *— Fraud.*] The defendant sent three head of cattle to a fair for sale, a bullock, a heifer, and an animal which from one point of view appeared to be a bullock, and from another a heifer, and which was, in fact, a hermaphrodite. The three animals were bought at £10 5*s.* each by the plaintiff, a cattle dealer. No warranty was given, and nothing was said as to the sex of the animals; but the plaintiff bought under the belief that he was buying either a bullock and two heifers, or a heifer and two bullocks. The defendant knew of the malformation of the hermaphrodite, and knew that the plaintiff would not have purchased it had he known of the malformation. By a careful and skilled examination the defect could have been discovered by the plaintiff; but in fact it was not discovered by him until after the sale. The animal afterwards died, the death being the direct consequence of the malformation:—*Held*, that the case came within the principles laid down by Blackburn and Hannen, JJ., in *Smith* v. *Hughes* (L. R. 6 Q. B. 597); that there was no binding contract for the sale of the animals in question, the parties never having been *ad idem*; and that the plaintiff was entitled to recover the price paid. *Held*, also, *per* Lord O'Brien, L.C.J., and Gibson and Boyd, JJ., *diss.* Madden, J., that there was evidence of misrepresentation sufficient to sustain an action. *Gill* v. *M'Dowell* [K. B. 463

HUSBAND AND WIFE—Divorce—Domicile—Jurisdiction - - - - 133
See DIVORCE.

—— Estate by curtesy—Wife never in actual seisin - - - - - - 643
See CURTESY.

—— Prosecution of husband for neglecting to maintain wife—Proceedings by guardian
See POOR LAW. [747

IMPLIED AUTHORITY OF SERVANT—False imprisonment - - 589, 623
See MASTER AND SERVANT.

INCITEMENT—*Criminal Law and Procedure (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 20), *sections* 2 (1), (2), (4), 5—*Proclamation*—Dublin Gazette—*Inciting to intimidation—Newspaper containing intimidatory matter — Circulation— Evidence—Summons.*] Summons charging the defendants in three counts—(1) with having, in a district proclaimed under the Criminal Law and Procedure (Ireland) Act, 1887, unlawfully used intimidation towards certain persons whose names were unknown, to wit, persons who had taken, used, or occupied farms of land in Ireland for grazing purposes, or from which tenants had been evicted, in consequence of said persons having done acts which they had a legal right to do, namely, to take, use, and occupy such farms; (2) with having in said district unlawfully incited certain persons whose names were unknown to use intimidation towards certain other persons whose names were unknown, to wit, &c. [as in 1st count]; (3) with having in said district unlawfully incited certain persons whose names were unknown unlawfully to take part in a criminal conspiracy to induce certain other persons whose names were unknown, to wit, &c. [as in 1st count]. The magistrate having convicted on the 1st count, and having held that there was no evidence that the "inciting" complained of in the 2nd and 3rd counts reached the persons alleged to be incited, acquitted all the defendants on these counts:—*Held*, that the summons was sufficiently specific. A copy of the *Dublin Gazette*, purporting to be published by authority and to be printed under the authority of His Majesty's Stationery Office, *held*, admissible to prove a proclamation under the Act contained in the *Gazette*. *Reg.* v. *Wallace* (17 Ir. C. L. R. 206) distinguished. Upon a charge of incitement as preferred in the summons, where the incriminated matter was published in a newspaper, the production of a copy of the newspaper purchased from a firm of newsagents described in an advertisement in the paper as wholesale agents, and who were proved to have been supplied with the papers in pursuance of a wholesale order, and which advertisement stated that the paper had agents for sale throughout Ireland, *held*, sufficient evidence of circulation to prove that the incitement reached persons intended to be incited. *Held*, further, by Lord O'Brien, L.C.J., and Madden and Boyd, JJ. (*diss.* Gibson, J.), that to establish the offence of "using intimidation towards," charged in the 1st count, it was not necessary to prove that the intimidatory matter reached any person intended to be thereby intimidated. The statutory offence is completed by the publication of the intimidatory matters with intent to intimidate, and therefore the proprietor of the paper was rightly convicted. The Criminal Law and Procedure (Ireland) Act, 1887, contrasted in this respect with the Conspiracy and Protection of Property Act, 1875. *Per* Gibson, J.: To establish intimidation as distinct from an attempt to intimidate, it is necessary to prove that some one might, in fact, be affected; and an overt act of attempted intimidation is not necessarily the complete offence. *Held*, as to the 2nd and 3rd counts of the summons, that, in order to warrant a conviction under those counts, there should be evidence that the incitement reached the persons intended to be incited, and that such evidence did exist, and that the magistrate was wrong in holding there was no such evidence. *Held*, in result, by the majority of the Court, that the judgment upon the 1st count against the proprietor of the newspaper should stand; but, by all the Court, that, on the evidence against the alleged printer and publisher

INCITEMENT—*continued.*
and the business manager, which the Court held insufficient to prove implication as against them, the judgment against them should be set aside. *R.* (*Lanktree*) v. *M'Carthy and others* K. B. 146

INDEMNITY—Rates—Lease—County and district charges - - - - - 490
See RATES.

INDORSEMENT—Writ of summons 329, 331
See SPECIALLY INDORSED WRIT. 1, 2.

INFANT—*Habeas corpus*—Jurisdiction to award costs - - - - - - - 117
See COSTS. 2.

INFIRMARY—County—Property of - 324
See COUNTY INFIRMARY.

INFORMATION—Pleading—General issue 517
See REVENUE.

INFORMER—Prosecution for not maintaining wife - - - - - - - 747
See POOR LAW.

INHABITANT OCCUPIER — Parliament—Subletting - - - - - - 417
See PARLIAMENT. 1.

INTERPLEADER—Service out of the jurisdiction—Orders XI., LVII. - - 458
See SERVICE OUT OF THE JURISDICTION.

INTERROGATORIES — *Practice — Action to recover possession on the title—Plea of possession—Gen. Ord. XXX., Rule* 11.] In an action to recover possession of land on the title, where the defence of possession is pleaded, the plaintiff is entitled to interrogate the defendant upon matters tending to support his own case, and is not deprived of that right merely because the discovery has the tendency or effect of disclosing the defendant's case. *Millar* v. *Kirwan* - - - K. B. 118

INTIMIDATION — Inciting to—Crimes Act, 1887 - - - - - - - 146
See INCITEMENT.

JUDGMENT — *Practice — Co-defendants—Judgment in default of appearance against one—Subsequent procedure against the other—Gen. Orders XIII., Rule* 4, *and XIV., Rule* 5.] A plaintiff, by entering judgment in default of appearance against one of two joint defendants, does not abandon his right to proceed to judgment against the other defendant. *Pim* v. *Coyle* - K. B. 457

—— Ejectment—Stay of execution - - 643
See CURTESY.

—— For one defendant—Disagreement as to co-defendants—Same solicitor—Taxation of costs - - - - - - - 311
See COSTS. 3.

—— Motion for - - - - - - 327
See MOTION FOR JUDGMENT.

——Several defendants—Severing damages—Conspiracy - - - - - 681, 730
See CONSPIRACY.

JUDICATURE ACT, 1877—Ss. 53, 65—Infant —*Habeas corpus*—Costs - - - 117
See COSTS. 2.

JURISDICTION — Justices — Chairman of district council—Expiration of office 101
See JUSTICES. 1.

—— Justices—Loan Fund Society—County Court —6 & 7 Vict. c. 91, s. 30 - - - 290
See LOAN FUND SOCIETY. 2.

—— Nullity of marriage—Domicil - - 133
See DIVORCE.

—— Service out of - - - - -
See SERVICE OUT OF THE JURISDICTION.

—— Supreme Court—*Habeas corpus*—Costs 117
See COSTS. 2.

JURY—Verdict of no libel—New trial 347, 387
See LIBEL.

JUSTICES — *Competency—Chairman af district council—Expiration of office—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37,) *s.* 26—*Application of Enactments Order* (22*nd Dec.*, 1898), *Article* 37.] Under the Local Government Act, 1898, sect. 26, and the Application of Enactments Order (22nd December, 1898), Article 37, the chairman of a district council is entitled to continue to act as a Justice of the Peace until his successor has accepted office and subscribed the required declaration. *R.* (*Scott*) v. *Justices of Londonderry* [K. B. 101

2. —— *Quarter sessions—Equal division of votes—Adjournment — Discretion*—Certiorari—*Mandamus —Licensing Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 12.] In discretionary applications to quarter sessions, where there is an equal division of opinion among the Justices, and they decline to make the order sought, and refuse to adjourn and re-hear the matter, the King's Bench will not compel them by mandamus to do so. *Semble*, *per* Gibson, J., that the same principle applies to complaints under the Petty Sessions Act. *M.* applied at the June Quarter Sessions, 1902, for a publican's license in respect of his hotel. The Justices were equally divided upon the question, "Whether it seemed fit to them to hear the application at the then sessions." The chairman thereupon directed an entry to be made in the Court-book—"This not being the annual licensing quarter sessions, it not seeming fit to the Court to grant the application, same is refused." The Bench declined to accede to the applicant's request to adjourn and re-hear the case. On motion to make absolute a conditional order for writs of *certiorari* and mandamus obtained by him :—*Held*, that the Court of Quarter Sessions was not under a legal duty, enforceable by mandamus, to adjourn the matter of the application; that the entry in the Court-book was substantially good; and that the conditional order should be discharged. *R.* (*Crowley*) v. *Justices of County Cork*; *R.* (*M'Intyre*) v.

JUSTICES—*continued.*
Justices of Donegal ([1902] 2 I. R. 252) distinguished. *R.* (*Mulcahy*) v. *Justices of Tipperary* [K. B. 108
—— Crimes Act, 1877—Inciting to intimidation—Summons—Evidence - - - 146
See INCITEMENT.
—— Loan Fund Society—6 & 7 Vict. c. 91, s. 30—Exclusive jurisdiction - - 290
See LOAN FUND SOCIETY. 2.
—— Obstruction to street—Procession—Reasonable user—14 & 15 Vict. c. 92, s. 3 (3) 82
See STREET.
—— Petty Sessions Act, 1851, sect. 10, sub-s. 4—Time—Loan Fund Society—Proceedings on promissory note - - - 305
See LOAN FUND SOCIETY. 1.
—— Poor Law Guardian — Acting while disqualified—Summary jurisdiction - 677
See DISQUALIFICATION.
KNOWLEDGE — Danger to neighbours from negligent keeping of bees - - 573
See NEGLIGENCE. 1.
LAND LAW (IRELAND) ACTS — Statutory tenancy — Subletting — Parliamentary franchise - - - - - 417
See PARLIAMENT. 1.
—— Townparks—59 & 60 Vict. c. 47 — Specially indorsed writ - - - - 331
See SPECIALLY INDORSED WRIT. 2.
LANDLORD AND TENANT — Action for rent—Personal representative—Specially indorsed writ - - - - 329
See SPECIALLY INDORSED WRIT. 1.
—— Action to recover possession of land—Non-payment of rent — Caretaker notice—Notice and summary—Statement of rent due when exceeding two years - 503
See ACTION TO RECOVER POSSESSION OF LAND.
—— Action to recover possession of land—Non-payment of rent—Townparks—Special indorsement - - - - - 331
See SPECIALLY INDORSED WRIT. 2.
—— Land Law (Ireland) Acts.
See LAND LAW (IRELAND) ACTS.
—— Lease.
See LEASE.
—— Prescriptive rights between tenants—Twenty years' user—Lost grant - - 730, 739
See EASEMENT.
—— Statute of Limitations — Administrator of tenant—Possession by executor *de son tort* - - - - - - 95
See LIMITATIONS, STATUTE OF.
LEASE—Covenant—Rates—County and district charges—Poor rate—Segregation 490
See RATES.
LIABILITY OF EMPLOYER—Tortious act of servant - - - - 589. 623
See MASTER AND SERVANT.
LIBEL—*Newspaper publication—Matter of public interest—Newspaper Libel Act—Verdict of "No libel" found by jury—New trial—Power of Court to grant.*] The jurisdiction and duty of the Court in dealing with the finding of a jury upon the question of "libel or no libel" considered: they are the same in kind and in principle as upon any ordinary issue of fact upon which the jury is the final tribunal: the difference, if any, is only of degree. The plaintiff, an auctioneer and farmer at *E.* in the county of Clare, took a farm, near *E.*, which had been surrendered by tenants named *F.*, who were not willing to give the rent which the plaintiff agreed to pay. *T. F.*, a brother of the former tenants, brought the matter before the United Irish League, and the matter was discussed at several meetings. Between 3rd October, 1901, and 25th January, 1902, several publications appeared in the defendants' paper about the matter. The first was a letter written by *T. F.* on the 3rd October, 1901, which he concluded by saying "that he would continue to denounce the grabber until justice was done to his victims." The last was a report, stating that shots had been fired at houses of parties who had purchased goods from an *E.* merchant who had "become very notorious." The intervening publications complained of consisted of reports of resolutions passed at meetings of the League, at which plaintiff was described as a grabber, and his conduct was denounced. After the first three meetings the plaintiff appeared before two meetings of the League, to explain the circumstances under which he took the farm, at the first of which nothing was done, and at the second there was an investigation by the committee, at which he was not present. He stated that he would appeal to the executive tribunal of the United Irish League, and he wrote a letter, stating his grounds of defence to the charge of landgrabbing, which the defendants published in their paper. The plaintiff's business was ruined in consequence of these publications. The plaintiff did not pursue his appeal to the executive of the United Irish League, but brought the present action, the libels complained of being the letters written to, and the reports of meetings published in, the defendants' paper. The defendants pleaded no libel, fair comment, and a special defence under the Newspaper Libel Act, that the resolutions of the League branches were published in the ordinary course of business, and were fair reports of proceedings of public meetings concerning matters of public interest. At the trial the Judge left the question of libel, or no libel, to the jury, and they found that the publications were [illegible]bels. Counsel for the plaintiff asked for a on the special defences, but the Judge, to

LIBEL—*continued.*
avoid the necessity of a second trial, left the issues of fact on the special defences to the jury, who found that the matters commented on and published were matters of public interest, and they likewise found the other issues in favour of the defendants:—*Held* (affirming the decision of the King's Bench Division), that the verdict should be set aside; that the publications did not relate to matters of public interest, but to the private transactions of two individuals; that a verdict on the special defences ought to have been directed for the plaintiff; that the plaintiff was not estopped by his conduct from showing that the transaction was not a matter of public interest, and that there ought to be a new trial, as the issue of libel or no libel should have been decided independently of the other issues, and the jury might not have clearly apprehended the real issues to be tried. *M'Inerney* v. *Clareman Printing and Publishing Co.* K. B. 347; APP. 387

LICENSING ACTS—*License—Good character—Undertaking to use for purposes of hotel, and not otherwise — Violation of undertaking — Condition for payment of sum of money to be applied in extinguishing another license—Public policy.*] An applicant for the usual certificate of good character to enable him to renew his license in 1901 gave an undertaking in open Court to persons objecting to the granting of the certificate that he would remove a public drinking bar which he had opened, and conduct his premises for the future as a hotel in accordance with an undertaking given to the Recorder when the license was originally granted in 1899. He failed to remove the drinking bar or to conduct his premises as he had agreed:—*Held* (by the King's Bench Division and Court of Appeal), that such conduct was evidence to sustain the decision of a licensing authority, before whom the application came for a certificate of good character in the following year, that the applicant was not of "good character" within the meaning of the Licensing Code. The applicant for a new license in the year 1899, in consideration of same being granted, paid into Court a sum of £400 to be applied in purchasing and extinguishing an operative license with the approval of the Court, and also gave an undertaking to use the license for hotel purposes only:—*Held* (by the King's Bench Division), that the undertaking so given was void. The payment of money by the licensee ought not to be made a condition for granting a license under the Licensing Acts. *R.* (*Bourke*) v. *The Justices of Dublin*; *R.* (*Moriarty*) v. *The Same* K. B. 429; APP. 440

2. ——*Licensing* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 18), *s.* 6—*New license—Adjoining premises—Quarter Sessions—Power of County Court Judge to direct other magistrates on point of law.*] The provisions in sect. 6 of the Licensing (Ireland) Act, 1902, enabling the licensing authority to grant a new license to premises attached to or adjoining premises licensed at the date of the passing of the Act, apply only to the case where the new license includes the premises formerly licensed, and not to the case of a transfer of a license from one set of premises to another. *Per* Palles, C.B.: Every magistrate at Quarter Sessions is entitled to form his own opinion on a question of law; but he would be ill-advised if he did not follow the law as laid down by the County Court Judge. *R.* (*Kennedy*) v. *The Chairman and Justices of Co. Antrim* [K. B. 671

3. —— *Licensing* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 18), *s.* 2—*Spirit grocer—Application for publican's license.*] By section 2 of the Licensing (Ireland) Act, 1902, after the passing of the Act "no license shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except (1) for premises which are now licensed, or which were licensed at any time since the 1st day of January, 1902":—*Held*, that the words "license" and "licensed" must be read distributively, and that the exception in question did not entitle the holder of a spirit grocer's license to apply for a publican's license. *R.* (*Collins*) v. *The Chairman and Justices of Co. Donegal* [K. B. 533

—— Quarter Sessions—Justices equally divided
See JUSTICES. 2. [108

LIEN—Solicitor's—Charging order - 287
See SOLICITOR'S LIEN.

LIMITATIONS, STATUTE OF—*Executor de son tort—Chattels real—Next-of-kin—Administrator.*] A person who has gone into possession of chattels real of a deceased, as executor *de son tort*, and remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, rely on the Statute of Limitations in answer to an action for the recovery of the lands brought by a person taking out administration to the deceased. *Doyle* v. *Foley* - K. B. 95

—— Promissory note to Loan Fund Society—Petty Sessions Act, 1851, sect. 10, sub-s. 4 308
See LOAN FUND SOCIETY. 1.

LIMITED OWNER—Dedication of public right of way - - - - - - 45
See WAY.

LOAN FUND SOCIETY—*Promissory note—Death of maker—Liability of his executors—Executor de son tort—Limitation of time—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 10, *sub-sect.* 4—6 & 7 *Vict. c.* 91—63 & 64 *Vict. c.* 25.] Proceedings by the treasurer or secretary of a loan society to recover the amount of a promissory note made to him under the Charitable Loan Societies (Ireland) Act, 1843, for the repayment of a loan from the society, may be taken against the personal representative (including an executor *de son tort*)

LOAN FUND SOCIETY—*continued.*
of a deceased maker. Proceedings by the treasurer or secretary of a loan society, on notes made to him for the repayment of loans under the above-mentioned Act, are subject to the provisions of sect. 10, sub-sect. 4, of the Petty Sessions (Ireland) Act, 1851, and must be brought within six months from the time when the cause of complaint arose. *Atthill, Appellant*; *Woods, Respondent* K. B. 305

2. —— *Promissory note—Jurisdiction — County Court—Justice of the Peace*—6 & 7 *Vict. c.* 91.] The treasurer or secretary of a loan society cannot proceed by civil bill to recover the amount of a promissory note made to him under the Charitable Loan Societies (Ireland) Act, 1843, for the repayment of a loan from the society. His sole remedy is by complaint before a Justice or Justices of the Peace under section 30 of the Act. *Moore* v. *Donagher* - - - - - - K. B. 290

LOCAL GOVERNMENT— Auditor — Powers and duties of—Guardians of Poor Law Union—Accounts—Evidence - 141
See AUDITOR. 2.

—— Auditor—Subsistence allowance—Surcharge
See AUDITOR. 1. [335

—— Chairman of District Council—Expiration of office—Competency to act as Justice of the Peace - - - - - 101
See JUSTICES. 1.

—— Compulsory purchase - - - 317
See COMPULSORY PURCHASE. 1.

—— Existing officer — Loss of income — Urban Sanitary District formed subsequent to Local Government Act - - 179
See EXISTING OFFICER. 1.

—— Maiming of peace officer - - 445
See PEACE OFFICER.

—— Poor rate—Segregation - - - 490
See RATES.

—— Vesting of property—County Infirmary 324
See COUNTY INFIRMARY.

LOST GRANT — Easement—Tenants of same landlord - - - - 730, 739
See EASEMENT.

LUNATIC ASYLUM—Compulsory purchase—Accommodation works - - 317
See COMPULSORY PURCHASE. 1.

MAIMING—Peace officer—Compensation 445
See PEACE OFFICER.

MALICIOUS INJURY — *To property—Compensation—Breaking a plate glass window for the purpose of committing a larceny—Subsequent conviction for the felony—Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97)—*Local Government Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 5.] For the purpose of committing a larceny, for which he was subsequently convicted, a thief broke a window pane, the property of the owner of the stolen goods :—*Held*, that the breaking of the window pane was a

MALICIOUS INJURY—*continued.*
crime punishable on indictment, under the Malicious Damage Act, 1861, and a criminal injury, for which compensation to the owner might be awarded under the Grand Jury Act, 1836, as extended by the Local Government (Ireland) Act, 1898, sect. 5, sub-sect. 1. *Wilde* v. *Armagh County Council* (2 New Ir. Jur. 169) disapproved of. *In re Borrowes* ([1900] 2 I. R. 593) followed. The statutory meaning of the word "malice" considered. *M'Dowell, Applicant*; *Corporation of Dublin, Respondents* - - - - - - K. B. 541

MANDAMUS—Justices—Equal division of votes—Application for publican's license at June Quarter Sessions—Refusal to adjourn - - - - - - 108
See JUSTICES. 2.

MASTER AND SERVANT—*Scope of employment — Assault — False imprisonment—Practice—Parties — Suing a fancy name — Appearance by partner to writ issued against firm — Depriving successful party of costs—R. S. C. Ir., Orders IX., R.* 9; *XII., R.* 9; *XVI., R.* 14; *XLII., R.* 10.] An incorporated Company, called "Shows, Limited," were proprietors of a public entertainment known as "Savage South Africa," of which *F.* and *H.* were advertised as managing directors. *H.* was managing director of Shows, Limited, and *F.* a paid servant of that Company. The plaintiff went to see the entertainment, and took a ticket at the door, paying *D.*, the ticket-issuer, a sovereign, and receiving change. About half an hour afterwards *D.*, who was responsible for the money taken, discovered that his cash was half-a-sovereign short, and believing that he had given plaintiff half-a-sovereign too much, he went to him and asked for the half-sovereign, and getting no satisfaction, brought the police, by whom plaintiff was for a time detained in custody. The manager of the entertainment was on the premises on the occasion, as also was *F.*, but neither of them directed or sanctioned the arrest. The plaintiff issued a writ, claiming damages for assault and false imprisonment, naming as defendants "Savage South Africa Co." There was no such Company in existence. The writ was served on *F.*, the indorsement of service stating that he was served as manager to Savage South Africa Co. *F.* and *H.* entered appearances in their own names, requiring a statement of claim. The appearances were entered before the coming into operation of the Rules of 1902. A statement of claim was delivered, which alleged that the defendants were the proprietors and managers of the Company known as Savage South Africa. Interlocutory judgment was marked in default of defence. *F.* and *H.* applied to have the judgment set aside on the ground of their absence from Ireland and of surprise, and it was set aside on the terms of their paying plaintiff's costs, and

MASTER AND SERVANT—*continued.*
giving security for costs and damages to the amount of £50. On the motion an affidavit had been filed on behalf of *F.* and *H.*, stating that *F.* was a paid servant and *H.* a shareholder and director of Shows, Limited, and that there was no such Company as Savage South Africa. A defence was delivered by *F.* and H., denying that "the defendants" were proprietors or managers of the Company known as Savage South Africa, and denying that *D.* was the servant of the defendants, and denying that the acts complained of were done in the scope of *D.*'s employment or by the defendants' authority:—*Held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; *diss.* Andrews, J.) and by the Court of Appeal, that *D.* had no implied authority to have the plaintiff arrested, and that judgment should be entered for the defendants; but *held*, by Lord O'Brien, L.C.J., *diss.* Gibson, J., that having regard to the nature of the statement of defence delivered by *F.* and *H.*, they should be deprived of the costs of the action and the argument in the King's Bench Division. *Held*, by Lord O'Brien, L.C.J., that *F.* and *H.* were entitled to have the action dismissed as against them on the further ground that they were not proprietors of a Company known as Savage South Africa. *Held*, by Andrews, J., that *D.* had implied authority to have the plaintiff arrested; that it was not open to *F.* and *H.* to make the case that they were not partners in a firm styled Savage South Africa Co., and that the plaintiff was entitled to sustain a verdict for damages against Savage South Africa Co. *Held*, by the Court of Appeal, that there were no grounds for exempting the plaintiff from costs. *Held*, by FitzGibbon, L.J., that assuming the plaintiff to have a cause of action, he was warranted by Order XVI., Rule 14, in naming "Savage South Africa Co." as defendants: that service upon *F.* was good service upon the partners (if any) carrying on the exhibition; but that unless the point was waived, *F.* was not, by entering an appearance, precluded from denying that he was a partner; that such a defence was not, however, open to *H.* after he entered an appearance, and thereby admitted service. *Cullimore* v. *Savage South Africa Co.*
[K. B. 589; App. 623

—— Seduction—Death of father of seduced girl before birth of her child - - 407
See Seduction.

—— Workmen's Compensation Act, 1897.
See Workman.

MOTION FOR JUDGMENT—*Practice—Long vacation—Time—Gen. Ord. XIV., Rule* 1.] The long vacation will not be counted in the period at the termination of which a plaintiff is too late in moving for final judgment. *Hogg* v. *Robertson*
[K.B. 327

MOTION FOR JUDGMENT—*continued.*
—— Special indorsement - - - 329
See Specially Indorsed Writ. 1.

MOTIVE—For injury to peace officer - 445
See Peace Officer.

NEGLIGENCE—*Bees—Kept in unreasonable numbers and at an unreasonable place—Negligence in the management of beehives—Smoking hives, with knowledge of danger to those in the immediate neighbourhood—Remoteness of damage.*] Plaintiff and defendant resided on adjacent farms. Defendant, who was a farmer acquainted with the ways and management of bees and horses, placed and kept upwards of twenty beehives at some distance from his own stables and farmyard, at the boundary fence beside plaintiff's yard and haggard. The bees swarming from these hives frequently caused annoyance to, and gave rise to complaints from, the inhabitants of the farm upon which plaintiff resided. On the occasion in question defendant proceeded to the hives for the purpose of removing honey, and for that purpose smoked the hives with a "smoker." For his own protection he wore a crape veil and a suit of sting-proof garments. There was evidence that he knew, or ought to have known, that plaintiff was likely to be tackling his horse at this very spot, and that his horse was there, but he did not warn plaintiff, or take any other precaution on his account. Numbers of bees, irritated by the smoking operation, swarmed upon plaintiff and his horse. The horse, stung by the bees, dragged plaintiff and threw him violently against a wall, causing very severe injuries to his spine. The jury found that plaintiff's injuries were caused by the bees having stung plaintiff and his horse; that they were kept on defendant's land negligently, in unreasonable numbers, at an unreasonable place, and with appreciable danger to the inhabitants of the adjoining farm; that the bees were, to the knowledge of defendant, of a dangerous and mischievous nature, and accustomed to sting mankind and domestic animals; and that the honey was not taken from the hives on the occasion in question with reasonable care, skill, and prudence; and returned a general verdict for the plaintiff, £200 damages:—*Held*, that, having regard to the special facts of the case and findings of the jury, the verdict ought not to be disturbed. *Held*, also, that the damage was not too remote. *O'Gorman* v. *O'Gorman*
[K.B. 573

2. —— *Liability—Corporation performing public duties—Servants of the Crown—Commissioners of Public Works—Public park—Maintenance out of funds voted by Parliament—No power to levy tolls or rates—St. Stephen's Green Act*, 1877 (40 & 41 *Vict. c.* cxxxiv).] By the St. Stephen's Green Act, 1877, the square, which previously had been vested in Commissioners as a private square, was vested in

NEGLIGENCE—*continued.*
the Commissioners of Public Works, who were, by the Act, charged with the duty of maintaining the same, to be used as a public park, with power to accept private subscriptions from persons willing to contribute towards carrying into execution the purposes of the Act, but with no power to levy rates or tolls, though authorised to defray such of the expenses incurred in carrying the Act into execution as could not be defrayed out of moneys received by them under the Act out of moneys to be provided by Parliament. The plaintiff in this action sought damages for injuries received by him while lawfully using the square, by coming in contact with an iron railing, which the statement of claim alleged was erected therein by the Commissioners of Public Works in a negligent and dangerous manner:—*Held* (Palles, C.B., *dissentiente*), that the Commissioners of Public Works in Ireland were not, by virtue of the Act, constituted servants of the Crown. *Held*, also, that it was no defence to an action of negligence that the defendants had received no money under the Act applicable to the purposes of the Act, and that the expenses incurred by them in carrying the Act into execution were solely defrayed out of moneys provided by Parliament for such purpose, and that Parliament had not provided moneys for payment to the plaintiff, or out of which he could be paid any damages in case such should be recovered against the defendants. *Held*, also, that it was no defence to an action of negligence that the defendants had no power to levy tolls, nor were any moneys, other than moneys voted by Parliament, received by them in respect thereof, and the defendants had no property or moneys for payment to plaintiff, or out of which the plaintiff could be paid any damages. *Wheeler* v. *Commissioners of Public Works in Ireland* - - APP. 202

NEW LICENSE—Adjoining premises - 671
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NEWSPAPER — Defamatory publication — Matter of public interest—No libel
See LIBEL. [347, 387

NEW TRIAL—Verdict of no libel - 347, 387
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NEXT-OF-KIN—Executor *de son tort*—Chattel real—Statute of Limitations - - 95
See LIMITATIONS, STATUTE OF.

NO LIBEL—Verdict—New trial - 347, 387
See LIBEL.

NOTICE—Ejectment for non-payment of rent—Over two years due - - - 503
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NULLITY OF MARRIAGE — Divorce — Domicile—Jurisdiction- - - 133
See DIVORCE.

OBSTRUCTION—Public right of way—Action—Particular damage - - - 45
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—— Street—Procession—Reasonable user—14 & 15 Vict. c. 92, sect. 3 (3) - - 82
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OCCUPATION—Non-exclusive—Franchise 417
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ORDERS, GENERAL—1891 (19th January), Supreme Court, III., R. 6 - - 329
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—— —— —— R. 6*a* - - - - - 331
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—— —— IX., R. 9 - - - - - 589, 623
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—— —— XI. - - - - - - 458
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—— —— XII., R. 9 - - - - - 589, 623
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—— —— XIII., R. 4 - - - - 457
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—— —— XIV., R. 1 - - - - 327
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—— —— —— R. 5 - - - - - 457
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—— —— XVI., Rr. 4, 5 - - - 681, 730
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—— —— —— R. 14. - - - 589, 623
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—— —— XVIII., R. 1 - - - - 681, 730
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—— —— XXX., R. 11 - - - - 118
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—— —— XLII., R. 10 - - - 589, 623
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—— —— LVII. - - - - - - 458
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—— 1898 (22nd Dec.), Application of Enactments—Sched. Articles 9 (1), 12 (11) - 677
See DISQUALIFICATION.
—— —— —— Art. 15 - - - - 324
See COUNTY INFIRMARY.
—— —— —— Art. 37 - - - - 101
See JUSTICES. 1.

PARLIAMENT — *Franchise — Inhabitant occupier—"Owner or tenant"—Subletting of statutory tenancy—Land Law (Ireland) Acts*, 1881–1896.] The tenant of a holding subject to a statutory tenancy under the Land Law (Ireland) Acts, without the consent of the landlord, sublet the dwelling-house on the holding to her son by an agreement in writing at a rent of £2 per annum, and after the subletting and during the qualifying period continued to reside in the house with him:—*Held*, reversing the decision of the Revising Barrister, that the son was not in exclusive occupation of the house as a tenant, and was not entitled to the franchise as inhabitant occupier. *Glenn* v.

PARLIAMENT—*continued.*

Brennan (29 I. L. T. R. 79: 2 Lawson 10) discussed. *Riddall* v. *Mullan* - - App. 417

2. —— *Franchise — Non-payment of rates — Tender.*] A voter, whose name appeared on the Parliamentary Register, offered payment in the month of May, 1902, to the rate-collector of all poor rates due in respect of the qualifying premises up to January 1, 1902. The rate-collector refused to accept payment of the rates so offered unless the half-year's rates that had since become payable were paid with them. The voter subsequently, in June, 1902, caused a tender of the rates due up to January 1 to be made to the collector, who again refused to accept the same. The rates were not paid on July 1, 1902:—*Held*, that payment of the poor rates was an essential condition for obtaining the franchise; that tender was not equivalent to payment so as to support the qualification; and that the name of the voter should be removed from the register. Another voter, whose name was on the Parliamentary Register, called on the rate-collector on March 1, 1902, and offered to pay the rates then due. It being inconvenient to the collector, though in his office hours, to take the rates on this occasion, he requested the voter to defer payment and call again. The Revising Barrister found, as a fact, that but for the neglect of the collector all the rates due in respect of the qualifying premises up to January 1, 1902, would have been then paid by the voter. Subsequently, after March 31, 1902, the voter again called on the collector, and offered to pay the same rates, but the collector refused to accept payment of the rates so offered unless the half-year's rates that had since become payable were paid with them. The rates were not paid on July 1, 1902:—*Held*, that payment of the poor rates was an essential condition for obtaining the franchise; that the conduct of the rate-collector afforded no excuse for their not being paid; and that the name of the voter should be removed from the register. *Kennedy* v. *Buchanan*; *Loughrey* v. *Buchanan*. [App. 484

PARTIES—Action by agent - - - 5
See Reasonable Conditions.

—— Firm—Fancy name - - - 589, 623
See Master and Servant.

—— Joinder of defendants—Separate causes of action—Damages - - 681, 730
See Conspiracy.

PARTNERSHIP—Action against—Appearance by partner to writ against a firm 589, 623
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PEACE OFFICER—*Local Government—Compensation for maiming—Application by peace officer—Exertions to bring disturbers of public peace to justice—Motive for the injury done—Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 106—*Local*

PEACE OFFICER—*continued.*

Government (*Ireland*) *Act*, 1898, *sect.* 5.] The applicant and another constable, while engaged in patrol duty, arrested two men on the charge of larceny of a goose, which was found in their possession, and proceeded to take the prisoners to the barracks. On the way thither the prisoners offered resistance to the constables, and escaped from custody. The applicant pursued the prisoners, and succeeded in retaking one of them, who, on his being recaptured, inflicted on the applicant injuries which incapacitated him from acting as constable, and constituted maiming within the meaning of the statute. Both prisoners were subsequently tried and convicted for the larceny of the goose and the assault on the constables. The applicant sought to obtain compensation for the injuries under the Local Government (Ireland) Act, 1898, section 5:—*Held*, that the applicant was not, within the meaning of section 106 of the Grand Jury Act, 1836, maimed on account of his exertions as a peace officer to bring disturbers of the public peace to justice, and that therefore he was not entitled to compensation for his injuries. *Murphy*, *Applicant*; *County Council of County Cork*, *Respondents* - - - - App. 445

PLEADING—Amendment at trial - - 5
See Reasonable Conditions.

—— General issue—Information—Revenue 517
See Revenue.

—— No libel—Verdict—New trial - 347, 387
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—— Possession—Ejectment on title—Discovery
See Interrogatories. [118

POOR LAW—*Board of Guardians—Right to prosecute man for neglecting to maintain his wife—Corporation—Common informer—Justices*—10 & 11 *Vict. c.* 84, *section* 2.] A Board of Guardians (which is a body corporate) prosecuted *F.* at Petty Sessions for wilfully neglecting to maintain his wife, so that she became destitute, and was relieved in their workhouse. *F.* was convicted:—*Held*, without deciding whether or not a criminal prosecution could be instituted by a corporation as common informers, that the conviction should be upheld, since the Guardians were in the present case not common informers, but parties aggrieved. *R.* (*Ferris*) v. *Justices of Londonderry* - K. B. 747

—— Guardian acting while disqualified—Liability of - - - - - 677
See Disqualification.

—— Outdoor relief—Guardians' accounts—Audit—Evidence—Surcharge - - 141
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—— Rates.
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PRACTICE — Action to recover possession of land—Non-payment of rent - 503
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—— Amendment of pleadings - - - 5
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—— Appearance—by partner - - 589, 623
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See CERTIORARI.
—— Civil bill decree—Costs bringing up amount to over £20 - - - - 177
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—— Co-defendants—Contribution - - 454
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—— Co-defendants—Judgment by default against one - - - - - - - 457
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—— Costs.
See COSTS.
—— Debtors Act, 1872—Default in payment of instalment—Committal - 557, 564, 570
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—— Depriving successful party of costs 589, 623
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—— Discovery — Ejectment on title — Plea of possession - - - - - 118
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—— *Habeas corpus*—Costs - - - - 117
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—— Interpleader—Service out of the jurisdiction - - - - - - - 458
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—— Joinder of defendants—Separate causes of action—Damages - - - 681, 730
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—— Motion for judgment — Specially indorsed writ—Action for rent by personal representative - - - - - - 329
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—— Parties—Firm—Fancy name - 589, 623
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—— *Scire facias*—No relator—Judgment for defendant—Costs - - - - 474
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—— Service out of the jurisdiction.
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—— Sheriff's fees—Debtors Act - - 557
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—— Solicitor appearing for two defendants—Judgment for one with costs—Disagreement as to the other - - - 311
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PRESCRIPTION—Tenants of same landlord—Twenty years' user - - 731, 739
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PRINCIPAL AND AGENT — Right of action - - - - - - - 5
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—— Scope of employment - - - 589, 623
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QUARTER SESSIONS — Justices — Equal division of votes - - - - 108
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RAILWAY COMPANY—Conditions—Reasonableness - - - - - 5
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RATES—*Landlord and tenant—Lease—Covenant to indemnify landlord—Taxation—Poor rate—County and district charges—Union charges—Segregation—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37).] By a lease, dated 4th May, 1892, the plaintiffs demised to the late Board of Control certain lands, subject to a rent made payable "over and above all rates, taxes, assessments, and impositions whatsoever now payable, or hereafter to be imposed by Act of Parliament, or otherwise, on landlord or tenant in respect of said premises (land-

RATES—*continued.*
lord's proportion of poor rate, public water rate, and income tax only excepted)." Under the Local Government (Ireland) Act, 1898, the district in which the lands so demised were situated became an urban district, and the lease became vested in the defendants. The plaintiffs were rated upon half the rent payable to them under the lease, on the basis that the premises were demised for public purposes, and four demand notes for two years' poor rate up to February, 1901, were served upon the plaintiffs, and the amount due thereunder paid by them. On Case Stated by the Judge of Assize on a County Court appeal, where the plaintiffs claimed repayment of such proportion of the amount so paid by them as did not consist of union charges: —*Held*, that the plaintiffs were entitled to recover such proportion of the new poor rate as consisted of county and district charges. *Semble*: In such a case the poor rate is divisible, that portion of it described as union charges being "of the same nature" as the former poor rate. *Earl of Cork* v. *Cork County Council* - - - - K. B. 490
—— Collector—Loss of income - 179, 670
See EXISTING OFFICER. 1, 2.
—— Non-payment—Tender—Parliamentary franchise - - - - - - 484
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REASONABLE CONDITIONS — *Railway Company—Condition—Reasonableness—Claim to be made within specified time—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Parties—Principal and agent—Right of agent to sue—Amendment of pleadings.*] The plaintiff purchased thirty head of cattle at Moate, and had them booked to Carlisle, under a through contract with the defendant Company. The cattle were not booked by the plaintiff himself, but by a man sent by him, who signed the contract note "on owner's behalf." In the freight note, which was referred to in the contract note, the plaintiff was stated to be the owner. The defendants have, as the plaintiff knew, two rates for the carriage of live stock, a higher and a lower. The cattle here were, by plaintiff's direction, sent at the lower. The defendants undertake a more extended liability at the higher rate; but in each case the stock are carried subject to a condition that no claim in respect of live stock, for loss, injury, or delay, will be allowed unless made in writing, in case of injury or delay, within three days after delivery, such delivery to be deemed complete at the termination of the transit, or, in case of loss, within seven days after the time when the live stock should, in the ordinary course, have been delivered. The signed contract in the present case contained this condition. On the passage between Dublin and Holyhead fifteen of the cattle were killed and fifteen injured. The dead cattle were sold by the defendants for the value of their hides. No claim in writing was made in respect of the loss or injury within either three or seven days. The statement of claim contained counts claiming damages for breach of contract and breach of duty in not safely carrying the cattle, and not providing a proper vessel, and also counts in trover and detinue in respect of the dead animals. The statement of defence relied on the above condition as a defence to all the causes of action; and, as a further defence to the counts in trover and detinue, denied that the cattle were the plaintiff's, but there was no traverse of the plaintiff's property in the cattle in respect of the claim for not carrying safely. At the trial the plaintiff admitted that he was not the owner of the cattle at the time of the injury, but had purchased them for one *C.*, since deceased, and the jury found that they were the property of *C.* Before action brought, *C.'s* executors had made a claim in respect of the loss of the cattle. Subsequently an arrangement was made between plaintiff and *C.'s* executors, by which the ownership became vested in plaintiff:—*Held* (*per* Lord O'Brien, L.C.J., and Wright, J., *diss.* Gibson, J.), that the plaintiff was not entitled to recover on any of the counts, on the ground that the cattle belonged not to the plaintiff but to *C.*; that the plaintiff, in making the contract with the defendants, was acting merely as agent for *C.*, and defendants had notice of this before action; and that the defendants should be allowed to amend their defence by traversing the contract and the property in the cattle in relation to the counts for not safely carrying; also, *per* Lord O'Brien, L.C.J., on the further ground that the condition in question was just and reasonable. *Held* (*per* Gibson and Wright, JJ., *diss.* Lord O'Brien, L.C.J.), that the condition in question was not just and reasonable, and no fair alternative being offered, was void. *Held*, also (*per* Gibson and Wright, JJ.), that such condition was one "with respect to the receiving, forwarding, and delivering of animals, goods, or things" within the meaning of the 7th section of the Railway and Canal Traffic Act. *Dictum* to the contrary of FitzGerald, J., in *Moore* v. *Great Northern Railway Co.* (10 L. R. Ir., at p. 106) disapproved of. *Held* (*per* Gibson, J.), that the denial of the plaintiff's property in the cattle being confined in the statement of defence to the counts in trover and detinue, the plaintiff was entitled to succeed on the counts in contract for not safely carrying, and that, having regard to the course of the trial, the defendants should not be allowed to amend their defence—at all events, except upon terms of the defendants paying all costs up to the date of amendment. *Held* (*per* Gibson, J.): A condition by a Railway Company, that in respect of animals booked through by them or their agents for conveyance partly by railway and partly by sea, or

REASONABLE CONDITIONS—*continued.*
partly by canal and partly by sea, the Company shall be exempted from liability for any loss, damage, or delay which may arise during the carriage of any such animals by sea from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, in the same manner as if the Company had signed and delivered to the consignor a bill of lading containing such condition, is a just and reasonable condition. *Murphy* v. *Midland Great Western Railway of Ireland Co.* - - - - - K. B. 5

RELATOR—*Scire facias* without—Judgment for defendant—Costs - - - - 474
See SURETY.

REMOTENESS OF DAMAGE—Negligence in keeping bees - - - - 573
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See FEE-FARM GRANT.

RENT—Ejectment for non-payment 331, 503
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—— Statement of arrear—Notice and summary 503
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REVENUE—*Practice—Pleading—Information—Defence—Plea of general issue.*] A defendant to an information brought by the Attorney-General on the Revenue Side of the King's Bench Division to enforce payment of income tax is entitled to plead the general issue. *Attorney-General* v. *M'Cormack* [K. B. 517

RIFLE RANGE—Compulsory Purchase—Compensation - - - - - 192
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RIGHT OF WAY.
See WAY.

ST. STEPHEN'S GREEN—Commissioners of Public Works — Negligence — Liability
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SALE—Cattle—Hermaphrodite—Fraud - 463
See HERMAPHRODITE.

SCHEME—Collection of poor-rate - - 670
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SCIRE FACIAS—No relator—Judgment for the defendant—Costs - - - 474
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SCOPE OF EMPLOYMENT—Servant
See MASTER AND SERVANT. [589, 623

SEDUCTION—*Girl seduced while living with her father and mother—Child born after death of girl's father—Action by her mother—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *sect.* 1, *sub-sect.* 2—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.] The plaintiff, a widow, brought an action for the seduction of her daughter *S.* The seduction took place in the lifetime of the plaintiff's husband, *S.'s* father, and while *S.* was living with her parents, who were persons of humble rank. After her father's death *S.* continued to reside with the plaintiff, rendering her the ordinary household services. Two months after her father's death *S.* was delivered of a child, the result of the seduction:—*Held*, that the action could not be maintained by the plaintiff, either by the common law or by virtue of the Married Women's Property Acts. *Hamilton* v. *Long* [K. B. 407

SEISIN—Of wife - - - - - 643
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SERVANT.
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SERVICE—Seduction - - - 407
See SEDUCTION.

SERVICE OUT OF THE JURISDICTION—*Practice—Interpleader—General Orders XI. and LVII.*] Where an action is "properly brought against some other person duly served within the jurisdiction," the Court will give liberty to serve an interpleader summons in that action upon a third party resident out of the jurisdiction. *B.*, a person resident out of the jurisdiction, had handed over certain negotiable securities to *B.* and others, who were stockbrokers in Dublin, with instructions to have them sold. *B.* sold the securities in due course, but payment having been stopped, they remained in *B.'s* hands. Afterwards *G.*, who was resident in France, claiming that the securities were her property, and that they had been stolen from her, instituted an action against *B.* to recover the securities or their value. *B.* desiring to have it determined who was the owner of the securities, applied to the Court for liberty to serve notice of an interpleader summons in the action on *R.* out of the jurisdiction:—*Held*, that Rule 10 of Gen. Ord. XI., to which there is no corresponding Rule in the English Orders, applies to interpleader summonses, and that the interpleader summons in this action might be served out of the jurisdiction on *R.*, in accordance with the general provisions of the Order. *Galebrun* v. *Bruce, Symes, and Williams* [K. B. 468

SHERIFF—Fees—Debtors Act - - 557
See DEBTORS ACT, 1872. 1.

SHIP—*Charter party*—"*Cargo to be taken from alongside, always within reach of ship's tackles*"—"*Custom of port to be observed*"—*Custom of port of Belfast—Expense of chaining and rafting timber—Admissibility of evidence.*] By a charter-party a ship was to deliver cargo, as customary, at such place as the consignees might direct, always afloat; cargo to be taken from alongside at port of discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat; the custom of each port to be observed in all cases where not specially expressed. The cargo consisted of log timber, to be delivered at the port of Belfast, and a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and it had been measured by the official measurer:—*Held*, that the consignee, and not the shipowner, was liable to pay the expense of such rafting. *Held*, also, that as the measuring was for the benefit of both shipowner and consignee, the latter was not entitled to waive the chaining and measuring and insist on the timber being delivered log by log over the vessel's side. *Northmoor S.S. Co.* v. *Harland and Wolfe* [K. B. 657

SOLICITOR—For two defendants—Judgment with costs for one—Disagreement as to the other - - - - - 311
See COSTS. 3.

SOLICITOR'S LIEN—*Practice—Costs—Charging order for*—39 & 40 *Vict. c.* 44, *s.* 3.] A solicitor was employed by an executor and residuary legatee to obtain probate of a will in solemn form, and at the trial the will was admitted to probate by consent. Proceedings were afterwards taken by next-of-kin not parties to the action, to revoke the probate; but these proceedings were stayed for non-compliance with an order for security of costs. An agreement was subsequently entered into between these next-of-kin and the executor for a settlement, without the knowledge of the solicitor for the executor, and the farms of the deceased, which were the principal assets, were advertised for sale:—*Held*, that the solicitor was entitled to a charging order for his costs as between solicitor and client, under 39 & 40 Vict. c. 44, s. 3, on the beneficial interest of his client in the property of the deceased. *In the Goods of Murnaghan*; *M'Conville* v. *Williams* - K. B. (PROB.) 287

SPECIALLY INDORSED WRIT—*Practice—Action for rent by personal representatives—Chattel real—Gen. Ord. III., Rule* 6.] In an action by personal representatives of an intestate for rent which has accrued due from his tenants since his death, the writ is not specially indorsed unless it contains an averment that the intestate's interest was for a term of years. *Murphy* v. *Murphy* [K. B. 329

2. —— *Practice—Ejectment for non-payment of rent—Town parks—Gen. Ord. III., Rule* 6 *a—Land Law* (*Ireland*) *Act*, 1896 (59 & 60 *Vict. c.* 47).] Upon a motion to set aside a writ of summons in ejectment for non-payment of rent, on the ground that it was not specially indorsed under Gen. Ord. III., Rule 6 a, it was argued that the lands sought to be recovered was not a holding within sect. 12 of the Land Law (Ireland) Act, 1896, and the rules thereunder, inasmuch as they had been held in 1889 to constitute a town park. The lands were pastoral in their character, and it was alleged by the defendant that they would now, by the operation of section 6 of the Land Law (Ireland) Act, 1896, come within the fair rent provisions of the Land Code:—*Held*, that the writ should have been specially indorsed under Gen. Ord. III., Rule 6 a. *Held*, also, that if the plaintiff denied a sub-tenant's right under sect. 12 of the Land Law (Ireland) Act, 1896, on the ground that the lands in question did not constitute a holding within the section, he should have stated so in the special indorsement. *Stawell* v. *Curran* - K. B. 331

SPIRIT GROCER—Application for publican's license - - - - - 533
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14 & 15 Vict. c. 92—Petty Sessions, s. 3 (3) 82
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See LOAN FUND SOCIETY. 1.
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34 & 35 Vict. c. 109—Local Government, s. 12
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37 & 38 Vict. c. 69—Licensing, s. 12 - 108
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39 & 40 Vict. c. 44—Solicitors, s. 3 - 287
See SOLICITOR'S LIEN.
40 & 41 Vict. c. 57—Judicature, ss. 53, 65 117
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41 & 42 Vict. c. 52—Public Health, ss. 2, 203
See COMPULSORY PURCHASE. 1. [317
—— —— s. 7 - - - - - - 179
See EXISTING OFFICER. 1.
45 & 46 Vict. c. 75—Married Women's Property, s. 1, sub-s. 2 - - - - 407
See SEDUCTION.
50 & 51 Vict. c. 20—Criminal Law and Procedure, ss. 2 (1), (2), (4), 5 - - 146
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60 & 61 Vict. c. 37—Workmen's Compensation - - - - - - - 163
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See WORKMAN. 3.
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See WORKMAN. 2.

STATUTES—*continued.*
61 & 62 Vict. c. 37—Local Government, s. 5
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PEACE OFFICER.
—— —— s. 10 - - - - - - 317
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—— —— s. 15 - - - - - - 324
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—— —— s. 115, sub-s. 11, 15, 18- - 670
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2. Edw. 7, c. 18—Licensing, s. 2 - - 533
See LICENSING ACTS. 3.
—— —— s. 6 - - - - - - 671
See LICENSING ACTS. 2.

STREET — *Obstruction — Procession*—14 & 15 *Vict. c.* 92, *sect.* 3, *sub-sect.* 3.] *L.* was one of a a band, playing party tunes through the streets of Belfast. The band was followed by a large crowd. A constable cautioned the band against playing through a particular street, as an obstruction would be caused. The band persisted in playing through such street, and the crowd followed, with the result that the free passage of foot passengers and vehicles was temporarily interrupted. *L.* being charged before the magistrates, under 14 & 15 Vict. c. 92, s. 13, sub-s. 3, the magistrates found as a fact that free passage was obstructed, and that the obstruction was caused by *L.* and the other members of the band, and the crowd accompanying them, and was the direct result of the band playing in the street in question, in spite of the police warning, and they accordingly convicted *L.* :—*Held*, that the conviction must be quashed, the magistrates having overlooked or omitted to decide the real question, which was, whether the user of the street was, under the circumstances, reasonable? *Filson* v. *Morrell* (22 I. L. T. R. 7) distinguished. The law of processions through the streets considered. *Lowdens, Appellant*; *Keaveney, Respondent* [K. B. 82

SUBLETTING—Statutory tenancy—Franchise
See PARLIAMENT. 1. [417

SUBSISTENCE ALLOWANCE—Members of Borough Council—Surcharge - 335
See AUDITOR. 1.

SUBSTITUTION—Public right of way - 45
See WAY.

SUMMONS — Incitement to intimidation — Whether sufficiently specific - - 146
See INCITEMENT.

SURETY—*Liability of—Alteration of the duties and office of the principal debtor*—Scire facias—*Relator—Costs against the Crown.*] *B.* was in 1896 duly appointed to "the office of clerk and storekeeper" in the Armagh District Lunatic Asylum, at a salary of £80 per annum, with allowances valued at £50 (rations, fire and light, and apartments in the Asylum, &c.). On the passing of the Local Government (Ireland) Act, 1898, the Committee of Management separated the office of clerk and storekeeper, and appointed another person to be storekeeper. *B.* was continued as clerk, at a salary of £100, without apartments or other allowances, and was compensated (under sect. 115) for the loss of his emoluments as storekeeper. He was dismissed in 1900, and accounts showed that he was in default in respect of a sum of £52 14*s.* 6*d.* received by him during that year. The defendants, in 1897, had executed, as *B.'s* sureties, a bond to the Crown, conditional on the due discharge by *B.* of his duties in "the office of clerk and storekeeper." They had no notice of the changes made in 1899–1900. Proceedings having been instituted (in the name of His Majesty) by writ of *scire facias* against the defendants, as sureties for *B.*:—*Held* (on new trial motion), that, even assuming that the old office had not been, in fact, abolished, still it had been subjected to such material alterations that the bond could not be held to apply to it, and that the defendants were entitled to judgment. *Held*, further, following *Holme* v. *Brunskill* (3 Q. B. D. 495), that, even assuming the bond to apply to the office in its altered form, the defendants should have been given an opportunity of considering whether they would adhere to the bond or not. No relator was joined in the writ or pleadings. *Quære*, could the defendants, by applying to the Attorney-General at the inception of the proceedings to have a relator joined as a party, or otherwise, have secured to themselves a right to costs in the event of judgment being given against the Crown? *The King* v. *Herron and Montgomery* [K. B. 474

TAXATION OF COSTS—Two defendants—Judgment for one with costs—Disagreement as to the other - - - 311
See Costs. 3.

TENDER—Rates—Parliamentary franchise 484
See Parliament. 2.

TIMBER—Cargo—Delivery—Expense of chaining and rafting—Custom of port 657
See Ship.

TIME—Motion for judgment—Long vacation
See Motion for Judgment. [327

—— Specified within which claim to be made—Railway Company—Reasonable conditions - - - - - - 5
See Reasonable Conditions.

TOWN PARKS—Ejectment for non-payment of rent—Special indorsement - 331
See Specially Indorsed Writ. 2.

UNDERTAKER — Workmen's Compensation Act, 1897 - - - - - 522
See Workman. 2.

UNDERTAKING—Violation of — Publican — Character - - - - 429, 440
See Licensing Acts. 1.

UNION CHARGES—Rates—Covenant in lease
See Rates. [490

URBAN SANITARY DISTRICT — Provisional Order - - - 179
See Existing Officer. 1.

USER — Easement — Prescription — Tenants of same landlord - - - 731, 739
See Easement.

VACATION—Motion for judgment - 327
See Motion for Judgment.

WAY—*Public right of—Obstruction—Right of action—Particular damage—Dedication of substituted way—Dedication by limited owner (fee-farm grantee).*] Between 1844 and 1850 the sub-lessee for a term of years of certain lands, over which there had been in existence prior to 1805 a public right of way, substituted therefor another way, with a bridge and path. In 1874 the sub-lessee surrendered his interest to his immediate landlord, who held under a fee-farm grant dating from 1857. The fee-farm grantee continued in occupation of the lands for two years, when he re-let them to the defendant. During the two years of his occupation the fee-farm grantee acquiesced in the public user of the substituted way, and at the trial the jury found that he had acquiesced in and adopted the dedication to the public of the right of way as so altered. There was no evidence of dedication of or acquiescence in the substituted way by the owner in fee. The plaintiff, a small farmer, had been using said way as a means of access from his farm to the public road leading to the market town, about four miles distant. The defendant obstructed the way by removing the bridge and erecting a fence. The plaintiff was thereby forced to take a longer and more circuitous route when going to the market town, which he required to do about once a week, and was obliged on some occasions to pay for a car. On new trial motion in an action for obstruction:—*Held*, that it was competent to the grantee in a fee-farm grant to dedicate a public right of way, and that, under the circumstances of the case, the acquiescence of the fee-farm grantee in the act of his former tenant amounted to a dedication to the public of the substituted way, binding upon his interest, and all claiming under him, including the defendant. *Held*, further (Kenny, J., dissenting), that the evidence was sufficient to sustain the finding of the jury, that the plaintiff had suffered particular damage beyond that which was

WAY—*continued.*
common to the public at large, and that the verdict for damages found for the plaintiff by the jury at the trial could not be disturbed. *Smith* v. *Wilson* [K. B. 45
—— Street — Obstruction — Procession—Reasonable user - - - - - 82
See STREET.
WELL—Easement—Tenants of same landlord
See EASEMENT. [730, 739
WINDOW PANE—Breaking to commit larceny—Malice - - - - - 541
See MALICIOUS INJURY.
WORDS—"Cargo to be taken alongside, always within reach of ship's tackles"—Charter-party - - - - - - 657
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—— "Contrary to law or unfounded"—Local Government Act, 1871, s. 12 - 335
See AUDITOR. 1.
—— "Custom of port to be observed"—Charter-party - - - - - - 657
See SHIP.
—— "Factory"—Workmen's Compensation Act, 1897 - - - - - - - 163
See WORKMAN. 1.
—— "Maliciously"—Local Government Board Act, 1898, s. 5 - - - - 541
See MALICIOUS INJURY.
—— "Occupier"—Workmen's Compensation Act, 1897 - - - - - - - 163
See WORKMAN. 1.
—— "On, in, or about a factory"—Workmen's Compensation Act, 1897, s. 7, sub-s. (1)
See WORKMAN. 3. [511
—— "Undertaker"—Workmen's Compensation Act, 1897 - - - - - 522
See WORKMAN. 2.
—— "With respect to the receiving, forwarding, and delivering"—17 & 18 Vict. c. 31, s. 7
See REASONABLE CONDITIONS. [5
WORKMAN—*Employment of labourer in a dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Factory—Occupier.*] A labourer (not a seaman) was employed to bring the employers' barges, which were kept in the employers' dock at night, from their places in the dock, when the dock gates were opened, alongside vessels in an adjoining river, for the purpose of taking cargo into the barges and bringing it back to the quay of the dock to be there unloaded. In the course of this employment the labourer fell into the dock and was drowned:—*Held*, that the dock was a "factory," and that the employers were the "occupiers" of it within the meaning of the Workmen's Compensation Act, 1897, and that the widow of the deceased was entitled to compensation under that Act, payable by the employers. *Hanlon* v. *North City Milling Co.* - APP. 163
2. —— "*Factory*"—*Dock, wharf, or quay—"Undertakers"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *sect.* 23, *sub-s.* 1—1 *Edw.* 7, *c.* 22, *s.* 104.] *W. & Co.*, a firm of carriers in Dublin, were employed by the Post Office to carry parcels for them during the Christmas season. In consequence of the heavy traffic in parcels the Post Office had taken temporarily from the dock authorities a transit shed in the Custom House, Docks, Dublin, for the storage of parcels. The respondents brought the parcels from different parts of the city, including the quays, to the transit shed, from which they were forwarded to their destination. The approach to the transit shed was within the ambit of the docks, but the Post Office had not the exclusive occupation of the roadway. *F.*, a carter of *W. & Co.*, was at the transit shed, when he was accidentally crushed between his cart and the wall of the shed and killed. On an application by the widow of *F.* for compensation under the Workmen's Compensation Act, 1897:—*Held* (affirming the decision of the Recorder of Dublin), that the site of the accident was a factory within the meaning of the Workmen's Compensation Act, 1897, and the Factory and Workshop Act, 1895, and that *W. & Co.* were undertakers. *Fogarty* v. *Wallis & Co.* - - - - - APP. 522
3. —— "*On, in, or about a factory*"—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *sect.* 7, *sub-sect.* (1).] A workman was employed, along with other men in the same employment, in putting down a flooring of cement in a house which exceeded 30 feet in height, and was constructed by means of scaffolding. The workman left the house to fetch a pickaxe from his employer's yard. On his way he slipped and fell, receiving injuries, in respect of which he sought compensation. At the hearing before the County Court Judge no evidence was given as to the exact spot where the accident happened, or as to how far it was from the building where the man was working:—*Held*, that it lay on the applicant to show that the injury by accident arose out of and in the course of an employment "on, in, or about" the building, and that, not having discharged this *onus* by giving evidence of the exact locality where the accident happened, he was not entitled to compensation. *M'Adam* v. *Harvey* [APP. 511
WRIT OF SUMMONS—Special indorsement [329, 331
See SPECIALLY INDORSED WRIT. 1, 2.

THE END.

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